To Be Argued By:
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Estimated Time: 20 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs-

THOMAS S. CLAYTON,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

Steuben County Indictment Number 2015-0378
Steuben County Index No. 2015-0417CR
Appellate Division Docket Number KA 18-01340

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QUESTIONS PRESENTED

1. Was the entirely circumstantial proof in this murder-for-hire prosecution (PL§ 125.27[1][a][vi]) sufficient to establish beyond a reasonable doubt that Mr. Clayton procured the commission of the killing of Kelley Clayton pursuant to an agreement with Michael Beard to kill Mrs. Clayton for the receipt, or in expectation of the receipt, of anything of pecuniary value from Mr. Clayton?

Court Below: Yes.

2. Was the entirely circumstantial proof in this intentional murder as an accomplice (PL §§ 20.00, 125.25[1]), sufficient to establish beyond a reasonable doubt that Mr. Clayton acting in concert with Michael Beard with the intent to cause Mrs. Clayton's death, caused her death?

Court Below: Yes.

3. Is reversal of Mr. Clayton's conviction required due to the court's refusal to sanction the prosecutor for repeated Rosario and discovery violations and the resulting substantial prejudice incurred?

Court Below: No.

4. Did the court commit prejudicial error by admitting, without a hearing, unreliable and novel scientific opinion evidence derived from the expert witness's analysis, which was not based on accepted and reliable methodologies accepted within the relevant scientific or technical community?

Court Below: No.

5. Did the court err in ruling that the defense expert's affidavit and report detailing how the prosecution expert's testimony was based on a misleading extension and manipulation of data was not newly discovered evidence which required either the granting of the motion to set aside the verdict or a hearing on the motion?

Court Below: No.

STATEMENT OF FACTS

The Crime

At about 12:30 a.m. on September 29, 2015, Thomas (Tom) Clayton rushed his two young children to the home of the Claytons' neighbor, Derek Almy. Highly agitated and hyperventilating, Tom told Mr. Almy that they had been robbed. Tom left the children at the Almy house and returned with Mr. Almy to his home. On the way back to his home, Tom correctly warned Mr. Almy that "it's gruesome." Inside the house, Mr. Almy observed Kelley Clayton (Kelley), Tom's wife, on the ground on the main floor of the Clayton family home, obviously dead, nude below the waist, and blood on the walls (A 300-05, 1309-11, 1338-42). Kelley was 35 years old (A 1359).

Tom Clayton, a former minor league hockey player (A 1945, 1957, 1972), was production manager at ServPro, a successful and growing remediation business that was scheduled to sign a loan for an expansion the week of Mrs. Clayton's murder (A 1632, 2725-30, 2833-46). Mr. Clayton was a gambler and known to carry large amounts of cash. He took these large sums to casinos to gamble at the high stake tables. He talked openly to many people about his safes and having cash at his home (A 1378, 1640-44, 1858-65, 1872-73, 2844-3605). He flashed large sums of cash, up to $100,000, and once loaned his car containing $22,000 in cash to a friend's sister

(A 1630-31, 1963, 2159-61, 2927).

When police and emergency medical personnel arrived at the Clayton home, having been called by Tom, they confirmed that Kelley was dead in a pool of blood (A 1351-56, 3347).Tom told the responding police officer that when he arrived home from a poker game at about 12:30 a.m, he found Kelley lying dead and that his daughter, Charlie (age 7), told him that there had been a robber (A 3347-48).

Tom informed the police that on September 28, 2015, he had been at work at ServPro, had gone back to his home to drop off a four wheeler that Luke Tetreault (a co-worker) had borrowed the prior weekend, that he had Luke's truck, that he had then taken his daughter, Charlie, to gymnastics, and that after bringing Charlie home, went to Greg Miller's to play poker, (A 3347, 3362-63). Critically, when asked why someone would rob his house Mr. Clayton told the police that he had thousands of dollars in cash both in a safe under his bed and in a safe in his basement (A 3341-49, 3392). Mr. Clayton's statement that he had money in the two safes was neither included in the written report on Mr. Clayton's statement to the police nor passed on to the officers searching the house (A 2265-66, 3391-97).

The police officers searching the house observed an overturned table in the stairway to the basement (A 1739-40). The police never tried to lift fingerprints or sought DNA evidence from that table (A 1740, 2298). Nor did the police at the scene

take fingerprints from the safe in the basement or even look for the safe under the bed, let alone photograph that area or seek forensic evidence such as fingerprints or biological evidence (A 1741-42, 2264-67, 3049). The New York State Police Investigator who conducted the gathering of forensic evidence in the house testified that if he had known that Mr. Clayton had told the police that there was safe under the bed he would have gathered evidence from there (A 2265).

Nadia Granger, M.D., the Monroe County medical examiner who performed the autopsy on Mrs. Clayton, determined that she was killed by blunt force to the head. Prior to conducting the autopsy, Dr. Granger had been told that this was a "domestic case" (A 2557-75).

Instead of seeking evidence regarding the possible robbery, the police immediately assumed that Tom Clayton had killed his wife. Steuben County Deputy Sheriff Swan (Swan), one of the officers at the house, wore a body camera which captured him saying that "this looks like a domestic" – meaning that Mr. Clayton had killed Mrs. Clayton. On the video, Swan is whispering because he already decided that Mr. Clayton was the suspect, despite having no blood on him and despite having told the police that he had just returned from a poker game. (A 4501-15) Steuben County Sheriff James Allard testified that Swan told him that despite examining Tom Clayton seeking evidence of blood and finding none, he believed that this was a

domestic gone bad and that Tom had beaten his wife and was now trying to cover it up (A 2358-59).

Thus, having immediately concluded that Mr. Clayton was the killer, the police failed to even investigate the possibility of a robbery by seeking forensic evidence from the safe under the bed (hereinafter the lockbox) or the safe in the basement. The police jumped to their conclusion despite (1) the bloody crime scene and the injuries to Kelley Clayton, which strongly suggested that the assailant would have some blood on him (A 2215-20), and (2) Tom having told the police that he had been at a poker game that night, telling them where and with whom, providing an easily confirmable alibi. Indeed, when the police checked, they learned that, as he had told them, Tom had been playing poker at Greg Miller's house from 8 p.m. until about 12:15 a.m., shortly before arriving home and finding Kelley dead (A 1846-1850, 3103-10, 3135-46).

In fact, the person who killed Kelley Clayton was Michael Beard, Tom's former co-worker, who committed the crime along with Mark Blandford. On October 3, 2015, Beard confessed and physical and forensic evidence showed that he was the killer (A 2629-35, 4417-37). Blandford, who accompanied Beard, was permitted to plead guilty to Manslaughter in the Second Degree in exchange for cooperation (A 1562).

Shifting Prosecutorial Theory

With this information, the police shifted their theory. Instead of believing Mr. Clayton actually murdered his wife as Swan had assumed, the police and prosecutor theorized that Mr. Clayton had hired Beard to murder Kelley Clayton by providing Beard something of value. This theory was based entirely on circumstantial evidence dependent, in turn, on conjecture and speculation. Mr. Clayton had not given any inculpatory statements. No witness claimed to have observed or overheard any inculpatory discussion between Mr. Clayton and Beard regarding either the commission of such crime or compensation for the killing.

Michael Beard had first worked for Mr. Clayton at Paul Davis, another remediation company, Mr. Clayton owned prior to joining ServPro. While Beard worked there, Mr. Clayton bought him a bicycle so that he could get to work (A 1585, 1627-28). While working at Paul Davis, Beard was fired by Mr. Clayton for unethical behavior. At a later date, Beard was hired to work at ServPro (A 1592-94, 2767). While working at ServPro, Beard and Luke Tetreault, a young employee of ServPro, would go to the Claytons' house to fish and shoot guns (A 1819-20). In the summer of 2015, Beard, his wife, and two children fished in the pond on the Clayton family property.

On September 17, 2015, with Tom's approval, Mr. Beard was fired from

ServPro for stealing and using drugs (A 2102-07). At the time he was fired, Beard was living with his wife and children in an apartment co-owned by Tom and a friend. Mr. Clayton evicted them after Beard was fired because of Beard's failure to pay rent. At the direction of his wife, Beard then had gone to the Department of Social Services (DSS) for assistance housing until he obtained a job. There he was informed he needed both a notice of eviction and a letter of termination in order to receive aid (A 1387-1415, 1948-50).

In the days between his being fired and his murdering Mrs. Clayton, Mr. Beard made numerous calls and texts to people at ServPro, stating that DSS told him he needed documentation about the termination of his employment and from Tom Clayton regarding his eviction (A 2874-79 3939-43). He also made numerous calls and texts to Mr. Clayton in efforts to obtain these papers (A 3612-13, 3619, 3707-28, 3750, 3753, 3756-57).

On September 19, 2015, Beard texted his friend, Larry Johnson, complaining about the need to find a place to live and how Clayton wanted the rent money by Friday, but he did not have it (A 3737). On September 24, 2015, referring to the bosses who fired him, Beard texted Johnson "[y]o deez nasty buccras playing a dirty game, we need to talk about something." (A 3688-89).

Luke Tetreault described how on the Friday before Kelley's murder he had

contacted Tom (while Tom was in Ohio) to obtain permission to borrow Tom's four wheeler. Early the next morning Mr. Tetreault entered the unlocked Clayton garage by himself and removed the four wheeler and placed it in his maroon pickup truck. Mr. Tetreault testified that the Clayton home and garage were generally unlocked when anyone was home (A 1768-72, 1820-24).

Mr. Tetreault had originally planned on returning the four wheeler by unloading it and placing it on Mr. Clayton's truck that Monday at work. Mr. Clayton suggested instead that they could simply swap trucks (so Tom could unload it at home instead of having the four wheeler unloaded first at work and then unloaded again at his home). Tetreault and Tom would then get their respective trucks back on Tuesday (A 1176, 1820-24). Tom and Tetreault had previously swapped trucks numerous times (A 1825) and they agreed to that.

Andrea Spirawk, Kelley Clayton's best friend, also told how the garage door was open with a key to the house on a shelf inside (A 2163).

The truck that Mr. Clayton loaned Luke Tetreault, had stacks of cash and passport in a hockey duffel bag (A 2159-61, 2126-31, 2195). But, as noted above, the evidence was that Mr. Clayton often had large sums of cash and had once loaned a car containing $22,000 in cash to a friend's sister (A 1630-31, 2159-61, 2927).

The police obtained a security video (Exhibit 42) showing ServPro which

suggested that on the evening of Monday, September 28, 2015, Mr. Clayton dropped off Mr. Tertreault's truck, driving away in a ServPro truck, and that Mr. Beard drove away in Mr. Tetreault's truck (A 1980-2005). A later portion of the video, taken at 12:55 a.m. on September 29, 2015, shows a truck pulling into the ServPro parking lot and someone riding a bicycle leaving (A 2008). Previously, Mr. Beard had driven Mr. Tetreault's truck, and there were times when Mr. Tetreault was drunk and Beard had driven him home (A 1412, 1815).

The police believed that Beard and Blandford had driven Mr. Tetreault's truck to the Clayton home where Beard killed Mrs. Clayton. But Blandford described the truck they used as having a cab and a half with suicide doors and beige trim. Mr. Tetreault's truck had none of those features

(A 1547-48, 1779). Also, the tire tracks at the Clayton house did not match the tires on Mr. Tetreault's truck (A 2234-43, 2499-2500) and there were no traces of blood in his truck despite the bloody nature of the killing (A 2034, 2462-65, 2488). Tetreault's truck was thoroughly examined for trace or latent evidence, such as fingerprints, and none were found (A 2533-40). The police made no effort to obtain and conduct DNA testing of the bowl of half-eaten dip and chips found in the truck on September 29, 2015, and discarded by Mr. Tetreault's mother (A 2031-35, 2518-19).

Beard had been observed on a mountain bike at about 11:15 p.m. on September 28, 2015, (A 1463, 1464, 1480, 1482, 1485) and the police recovered a Mongoose bike with Mr. Beard's fingerprints (A 3483-84). Mr. Clayton's prints were not on that bike (A 3551). Texts between Mr. Clayton and Mr. Beard about different possible work for Mr. Beard suggest that Mr. Beard obtained this bike between September 21, 2015, when he couldn't get to a possible job site due to lack of a bike, and September 24, 2015, when he planned to go to a possible job by bike (A 3607-08, 3619). According to Mrs. Beard, the bike was from Mr. Clayton, but she did not know when, in relation, to the murder, Clayton had given Mr. Beard the bike (A 1398).

Mr. Beard did not have a driver's license because of unpaid fines in South Carolina. In August 2015, Brian Laing, the owner of ServPro had sent a ServPro check signed by Laing to South Carolina to pay the amount needed for Beard's license to be restored. But the check was returned because South Carolina would not accept a business check. Tom immediately gave the ServPro office manager a personal check from his joint account with Kelley Clayton to pay the fine, but she had not gotten around to mailing it. When Mr. Beard was fired Tom stated to the office manager that he still intended to pay Beard's fine (A 2858-64, 4593-95, 4602-03).

After Mr. Beard was fired from ServPro on September 17, 2015, while the Beard family was being evicted for not paying rent, Tom called friends who owned

businesses to see if they would hire Beard (A 2953-55, 3619, 4403-05). During the poker game at the Miller home on September 28, 2015, the night of the murder, one player mentioned that he was scheduled to receive a delivery of deer blinds, which weigh about 300 pounds each, and Tom agreed to help unload them (A 1851, 3123, 3137-38). Tom left the basement room where the poker game was held and then used the Miller family phone to call Beard. Mrs. Miller could hear the call, but did not pay attention to what was said (leaving open the possibility that Tom was checking to see if Beard, who needed money, wanted to help move the deer blinds) (A 1894-95).

Earlier that day, Mr. Clayton, a good customer of M & M Auto, used the landline phone at M&M Auto, saying that his cell phone wasn't working properly (A 1915-21).The service manager at M&M Auto acknowledged that cell phone coverage there was spotty and unreliable at that location (A 1918-19).

This was the evidence the prosecutor had and intended to introduce at Mr. Clayton's jury trial, when Mr. Clayton was indicted on charges of (1) murder in the first degree, alleging that Mr. Clayton procured the commission of the killing on Kelley Clayton pursuant to an agreement with Mr. Beard to kill Mrs. Clayton for the receipt, or in expectation of the receipt, of anything of pecuniary value from Mr. Clayton (PL § 125.27[1][a][vi]), (2) intentional murder in the second degree, that Mr. Clayton, acting in concert with Mr. Beard with the intent to cause Mrs. Clayton's

death, caused her death (PL § 125.25[1]), and felony-murder in the second degree, that acting in concert with Mr. Beard or others, Mr. Clayton or others, attempted arson and in the course of and in furtherance of that crime caused the death of Mrs. Clayton (PL § 125[3]) (A 6-8).

Sy Ray

Fifteen months after the murder and three weeks prior to a jury trial on these charges, the prosecutor hired Sy Ray, a retired police officer, with no technical education, to testify as an expert witness, Mr. Ray had developed a computer program which he claimed enabled him to map the location of cell phones more precisely than the cell providers (A 3967-71, 4130-37, 4150-51). The prosecution refused to reveal information about Mr. Ray prior to trial or openings (A330-333). Finally, mid-trial Mr. Ray produced two reports based on his proprietary program and on scan tests conducted by Mr. Ray driving by the area 16 months after the calls in question. In these reports, in addition to claiming that he was able to establish a number of times within the week prior to the murder in which Mr. Clayton and Mr. Beard's phones were near each other, he claimed to be able to determine that Mr. Clayton's call pattern indicated "stress" (A 330-333, 294-311).

Mr. Clayton's counsel moved to preclude this testimony and sought a *Frye* hearing claiming that Mr. Ray's methodology is unreliable and unscientific and that

his results were based on an intentional manipulation of data (A 259-88). The court denied this motion, without a hearing, except that the court precluded testimony as to Mr. Ray's claim that he could determine from the pattern and timing of the calls that there was stress (A 3993).

Counsel also unsuccessfully sought to preclude Mr. Ray's testimony because of the failure to timely provide discovery as required by CPL § 240.20 and *People v Rosario,* 9 NY2d 286, 289 (1961). Counsel explained that because of the late provision of this information he was not able to have an expert available to testify to refute Mr. Ray's testimony (A 3962-63) (During the trial, the prosecution repeatedly failed to timely provide discovery materials regarding numerous witnesses [Kim Bourgeois, Mark Blandford, Richard Flood, Rebecca White, and Michael Lostracco] in addition to the failure and refusal to provide any discovery materials as to Mr. Ray until mid-trial (A 979, 1002-06, 1525-29, 1936-39, 2689-91, 4321-24, 4379).

Mr. Ray proceeded to testify (with animation visuals) that, using his program, he determined that there were times on September 21, 24, and 28, 2015, Mr. Clayton and Mr. Beard's phones were near each other, and that, based on his January, 2017 scans, M&M Auto had good cell phone coverage (A 3974-4125).

The prosecutor described Mr. Ray's testimony as the "crux" of his case (A 3945) and it formed a key aspect of the arguments in summation that Mr. Clayton and

Mr. Beard had an agreement that Beard would murder Kelley Clayton for renumeration from Clayton (A 4910-17)

The Prosecution Presents Circumstantial Evidence as to Motive

In an attempt to establish a motive for Mr. Clayton to want to have his wife dead, the prosecution introduced evidence that about a year prior to the murder, Mr. and Mrs. Clayton had doubled the value of their life insurance policies (A 2636-78). The prosecution introduced proof that he had had a half million dollar life insurance policy on Kelley, but that in late 2014 he had inquired of Ms. Stone at State Farm, with whom he had engaged in sex at her initiative, for a quote on increasing Kelley's policy to one million dollars (A 2078-82). On cross-examination Ms. Stone acknowledged that Tom also had sought a quote on doubling his policy, that Paul Gingrich, who had sold the policies for State Farm had moved on, and that ultimately Tom told her he was switching to Paul Gingrich's new firm because Mr. Gingrich gave him a better quote (A 2086-90). Further, undermining this effort to establish that the life insurance evidenced an intent and motive for Tom to want to have Kelley killed, Paul Gingrich testified that in 2012, when he worked at State Farm, he had sold the Claytons life insurance policies of $1,000,000 for Tom and $500,000 for Kelley, that he recommended a review of policies every two years, that in 2014, after he switched companies he was able to double the coverage for both Tom and Kelley

for only slightly more money, and that Tom never made a claim on that policy after Kelley's death (A 2636-78).

The prosecution relied on evidence that Mr. Clayton was a womanizer who, while married, flirted with women (A 2081, 2091, 2150, 3423) had engaged in sexual relations with numerous women other than Kelley (A 1969, 2079-80, 2082-83, 3429-30, 3436-39), and told others about these relations (A 2081, 2800-01, 3431). The women with whom he had sex described these as no-strings attached sexual encounters and not as relationships or love affairs (A 2078-81, 2091-95, 3440). He had joked with two of these women about wanting to divorce Kelley (A 2076-77, 2093-94) and had told another that he was not being sexually satisfied by Kelley (A 2143-44), but that he would not divorce her because she would take everything (A 3425). He also had told his wife's teenaged niece, Molly Bourgeois, that he would divorce Kelley when the kids were older and that Christmas 2014 would be the last one with him around and everyone together as a family (A 3447-48) (while Molly's father testified that the families had already made plans to spend Thanksgiving 2015 together (A 1384).

There was no evidence that Kelley Clayton was aware of Mr. Clayton's sexual liaisons or, if she were aware, that she confronted him about them. The night before the murder, the Claytons went to a concert together with friends (A 3156) and texted

with each other when Mr. Clayton was in Ohio for work the preceding week, in an endearing manner (A 3812, 3798). At the same time he was texting Kelley, Tom was also engaged in sexually suggestive texts with a married woman with whom he had had sex (A 3798-05). No threats or discord between the Claytons were revealed in Kelley's texts or in communications with friends or relatives.

After the prosecutor presented the above described evidence at a jury trial, Mr. Clayton's counsel moved for a trial order of dismissal for both counts, arguing that in this purely circumstantial evidence case, the proof was insufficient to establish (1) that there was an agreement between Mr. Clayton and Mr. Beard for Mr. Beard to kill Mrs. Clayton upon the expectation that he would receive money or something else of pecuniary value as required for the murder in the first degree charge, or (2) that Mr. Clayton acted in concert with Mr. Clayton as required for the intentional murder in the second degree count (A 4318-22). The court cut off the arguments as to count three, granted the motion as to count three and denied it as to the other counts (A 4535).

Defense Witnesses

Mr. Clayton then presented a number of witnesses. Both Belinda and Robert Wilcox, who had been the co-owners of M&M Auto testified that Mr. Clayton had been a very regular customer there, and had used their telephone often (A 4552-57,

4644-48). Mr. Wilcox also testified that after the September, 2015 murder, Verizon made improvements in the cell coverage in the area of M& M Auto by adding a repeater about a mile from the business (A 4673-75). This testimony both undermined Mr. Ray's testimony based on his mid-trial scanning of the area that there was good cell coverage there in September, 2015 (A 4111) and the prosecutor's speculative theory that Mr. Clayton's use of that phone was to avoid detection. Further undermining the efforts of the prosecutor's suggestion that Mr. Clayton's life insurance policy on Kelley Clayton evidenced Mr. Clayton's intent and motive to kill his wife. John Kuehn testified and identified documents which were admitted showing that when the Claytons purchased their house he held the mortgage and required that the Claytons take out life insurance policies which he would be collaterally assigned to insure the payments were made on the mortgage (A 4684-89).

Dale Partridge, a private investigator and a retired State Police investigator testified that in January, 2016, he had taken the photographs (Exhibits A65-A67, in the Record at 5581-83) showing marks on the bed frame consistent with the removal of a box underneath the bed (A 4577-85).

Cynthia Ryan, who, supervises Chemung County's Emergency Assistance program testified that when Mr. Beard applied for emergency assistance on September 22, 2015, he was informed that he needed both proof of eviction and proof

of the last day of his employment by October 2, 2015 (A 4694-4704).

Finally, Phyllis Clayton, Mr. Clayton's mother, and her partner, Robert Bates, with whom she both lived and worked with in New Jersey, both testified that Phyllis has been planning on leaving New Jersey and arriving at Tom Clayton's home on the night of Monday, September 28, 2015, to stay with Tom and his family (which meant that she would have arrived when Kelley was murdered), but after long days at work decided, without telling Tom, that she was too tired to drive then (A 4730-4771).

On resting, counsel's renewed motions for a trial order of dismissal was denied (A 4149-60, 4163).

Summations and Verdict

In summation, the prosecutor urged the jury to speculate that the alleged meetings of Tom Clayton and Michael Beard testified to by Mr. Ray were to agree to have Mr. Beard kill Kelley Clayton, that the texts between Mr. Clayton and Mr. Beard regarding the eviction was just part of Clayton's double life, that the phone call during the poker game on the night of September 28, 2015, was not about deer blinds, and that Mr. Clayton seeking to help Mr. Beard secure employment after Beard was fired from ServPro and providing him a used bike was the pecuniary benefit Mr. Beard was receiving for killing Kelley, that the calls on the Miller and M&M Auto phones were an attempt by Mr. Clayton to hide his criminal enterprise with Mr.

Beard, that the exchange of trucks with Luke Tetreault (which was all initiated by Mr. Tetreault's borrowing Clayton's four wheeler), was part of the plan to kill Kelley Clayton, that maybe the untested guacamole in Tetreault's truck was from Mr. Clayton's daughter, and that Mr. Clayton's motive was the insurance policy and his desire to no longer be wed to Kelley (A 4895-4972).

On this evidence, Mr. Clayton was convicted of both the Murder in the First Degree and intentional murder in the Second Degree charges (A 5028).

Motion to Set Aside Verdict and Sentence

Prior to sentencing, Mr. Clayton filed a motion to set aside the guilty verdict, pursuant to CPL § 330 (A 326-27). Attached to the motion was a supporting memorandum of law, which, on the basis of an affidavit and report of Dr. Vladan Jovanovic, an expert witness retained by the defense. Dr. Jovanovic has a Ph.D. in electrical engineering, specializing in cell phone systems engineering, RF engineering, and geo-location, with more than 25 year of experience in these fields. In his affidavit and report Dr. Jovanovic details the numerous reasons that Sy Ray's reports and analysis were based on unreliable and unverifiable data, presented in a deliberately misleading and manipulative manner, Sy Ray's opinion rested on testing which was systemically not reliable and riddled with inconsistences and faulty assumptions. Dr. Jovanovic explained how this flawed methodology and data

produced testimony and visual exhibits which misleadingly appear to be grounded in sound science but were not supported in raw data and in some instances represent manual alterations of the data (A 351-396).

This motion was denied without a hearing, with the court finding (1) that the evidence of Dr. Jovanovic's affidavit and report was evidence which could have been discovered during trial, (2) that, unlike Mr. Ray's testimony, Dr. Jovanovic had not been subject to cross-examination which is not fair to the prosecutor, and (3) this was merely impeachment evidence (A 5043-44).

Despite Mr. Clayton submitting a pre-sentencing memorandum urging that the court impose the minimum possible sentences, which noted that Mr. Clayton passed a polygraph test in which he denied having hired Mr. Beard to kill his wife (A 504-05, 509-15), Mr. Clayton was then sentenced to life without parole on the conviction for Murder in the First Degree and 25 years to life on the conviction for Murder in the Second Degree (A 5098-99).

POINT I: THE PROSECUTION FAILED TO PROVE THAT MR. CLAYTON WAS GUILTY OF THE MURDER OF KELLEY CLAYTON

A. Introduction

The accusation that a married woman and mother of two young children has been brutally murdered by a man hired by her philandering husband is understandably disturbing. In such a case the revulsion and anger springing from the allegation and the information about the husband's non-criminal conduct create an equally understandable societal desire to punish the husband.

The danger created by this urge, however, is that the husband may be convicted not for a proven act, but due to the anger and desire to punish the alleged conduct. It is precisely against this urge, and the human tendency to accept as true what are mere suspicions, that the law has formulated exacting rules of analysis especially when there is no direct proof of guilt. Without these rules, the danger of a wrongful conviction looms.

The danger was realized in this case. It is not disputed that Michael Beard was the person who murdered Kelley Clayton. The case against Thomas Clayton lacked *any* direct evidence that he sought, desired, intended, or agreed to the murder of his wife or that he had procured the commission of the killing pursuant to an agreement with Beard to commit the murder. There were, and remain, significant gaps in the

inferences fairly drawn from the evidence. The jury's verdict, rather than resting on sound analysis and proof, was instead based on conjecture and explicit requests by the prosecutor in summation that the jury speculate.

This is not a typical prosecution for either murder in the first degree, under the theory of murder for hire (PL §125.27[1][a][vi]), or intentional murder in the second degree, as an accomplice (PL §§ 20.00 and 125.25[1]). Mr. Clayton was not present for the killing. He did not confess or admit to having any role in the murder of his wife. No person claimed to have observed Thomas Clayton discuss an intent to have his wife killed. No evidence was presented that Mr. Clayton desired or intended for his wife to be killed. No witness claimed to have observed or overheard any inculpatory discussion between Mr. Clayton and Mr. Beard regarding either the commission of such crime or compensation for the killing. No texts or e-mails or writings between Mr. Beard and Mr. Clayton discuss the commission of such crime. Mr. Beard, the actual killer, did not testify. No witness testified to have heard Mr. Beard claim that he would or did kill Kelley Clayton at Mr. Clayton's behest. No money from Mr. Clayton was found in Mr. Beard's possession or in any bank accounts associated with Mr. Beard. To the contrary, at the time of the murder, Mr. Clayton was evicting Mr. Beard and his family from their apartment co-owned by Clayton for failure to pay rent.

In sum, there was no evidence that Mr. Clayton sought to have Beard kill his wife, that Mr. Clayton and Beard had entered into an agreement for Beard to commit such a crime, or that Beard killed Mrs. Clayton because Mr. Clayton provided, agreed to provide, or created the expectation that he would provide Mr. Beard anything of pecuniary value if he committed this killing. Nor was there proof that Mr. Clayton, acting with the intention that Mrs. Clayton be killed, solicited, requested, commanded, importuned, or intentionally aided Beard to kill Mrs. Clayton.

Thus, as detailed below, Mr. Clayton's convictions must be set aside as unsupported by legally sufficient proof because the People did not prove beyond a reasonable doubt that he procured or was an accomplice to the intentional murder of Mrs. Clayton. Mr. Clayton fully preserved this issue by raising a timely and specific motion at the end of the prosecutor's case and then renewing it in its entirety after the defense case (A 4518-23, 4798-4810). If this Court finds that the evidence was legally sufficient, reversal is still required because the verdict was against the weight of the credible evidence. In addition, assuming that the evidence was legally sufficient and that the verdict was not against the weight of the evidence, the indictment should nevertheless be dismissed in the interest of justice because upon a review of this evidence there remains a grave risk that Mr. Clayton has been convicted of crime he did not commit (CPL § 470.15[3][c]; *People v Gioeli*, 288

AD2d 488, 489 [2d Dept 2001]; *People v Kidd*, 76 AD2d 665 [2d Dept 1979]).

B. Appellate Review of the Sufficiency of Circumstantial Evidence

"A verdict is based upon legally sufficient evidence if 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' (internal citations omitted)" (*People v Cintron*, 95 NY2d 329 [2000]). It is now well settled that the standard for appellate review of legal sufficiency of evidence to support a verdict based solely upon circumstantial evidence is no different than a review of a verdict based on direct evidence (*People v Rossey*, 89 NY2d 970 [1997]). The Court of Appeals, however, has also held that in the context of a circumstantial evidence case it becomes necessary for an appellate court to examine closely the process of analysis employed by the jury to avoid an unsupported verdict:

> . . . close judicial supervision is necessary to ensure that the jury does not make inferences which are based not on the evidence presented, but rather on unsupported assumptions drawn from evidence equivocal at best.

People v Kennedy, 47 NY2d 196, 203 [1979].

The Court has explained that in reviewing the sufficiency of purely circumstantial evidence, "the appellate court, viewing the evidence in the light most favorable to the People, must decide whether a jury could rationally have excluded innocent explanations of the evidence offered by the defendant and found each

element of the crime proved beyond a reasonable doubt." (*People v Reed*, 22 NY3d 530, 534–35 [2014]).

This level of appellate scrutiny is necessary to reduce the recognized danger in a purely circumstantial evidence case of a jury drawing unwarranted inferences. Such a risk is ". . . a danger legitimately associated with circumstantial evidence – that the trier of facts may leap logical gaps in the proof offered and draw unwarranted conclusions based on probabilities of low degree" (*People v Ford*, 66 NY2d 428, 441 [1985]; *see also People v Benzinger*, 36 NY2d 29, 32 [1973]).

As the Court of Appeals held in *People v Leyra* (1 NY2d 199, 206 [1956]), "[m]oreover, the facts from which the inferences are to be drawn must be established by direct proof: the inferences may not be based upon conjecture, supposition, suggestion, speculation or upon other inferences [internal citations omitted]."

As detailed below, the prosecutor exhorted the jury to perform both prongs of the legally impermissible reasoning decried in *Ford* and *Benzinger*: (1) leap the logical gaps in the evidence; and (2) and draw unwarranted conclusions based on probabilities of low degree. Thus, the prosecutor sought and obtained a guilty verdict based on speculation and conjecture.

C. The People Failed to Prove Murder in the First Degree under Penal Law § 125.27(1)(a)(vi)

To prove that Tom Clayton entered into a murder-for-hire scheme with Beard,

the prosecution had to prove that he had agreed with Beard to hire him in exchange for "the receipt...of anything of pecuniary value (PL §125.27[1][a][vi]).. The People failed to present evidence that there was an agreement of any sort between the two for Beard to kill Kelley Clayton, much less that the killing would be for the exchange of anything of pecuniary value.

It is undisputed that the person who killed Kelley Clayton was Beard, who committed the crime along with Blandford. Beard confessed to the killing and physical and forensic evidence showed that he was the killer (A 2629-35, 4417-37). Notably, eleven days prior to his committing this murder, Mr. Beard had been fired from his job at ServPro, where Tom Clayton was the production manager (A 2102-07). Mr. Clayton had then evicted the unemployed Mr. Beard, his wife and two children from their apartment, co-owned by Clayton (A 1413, 1415, 1948-50, 4609-11). Such a backdrop fails to support the prosecution's theory.

While working at ServPro, Beard would go to the Clayton house to go fishing and shooting (A 1819-20). In the summer of 2015, Beard, his wife, and two children fished in the pond on the Clayton family property.

After Beard was fired from Servpro, he and Mr. Clayton exchanged calls and texted numerous times about Mr. Beard needing documentation about his eviction to get assistance from DSS and about some possible jobs leads that Mr. Clayton may

have for Mr. Beard (A 3612-13, 3619, 3707-28, 3750, 3753, 3756-57).

Prosecution witnesses testified, without dispute, that the Clayton home and garage was generally unlocked when anyone was home and that there was a key to the house on a shelf in the garage (A 1768-72, 1820-24, 2163). Prosecution witnesses also testified, without dispute, that Mr. Clayton talked openly to many people about the safes in the home and his having large quantity of cash at his home (A 1378, 1640-44, 1858-65, 1872-73, 2844-45).

Upon learning of the murder, the police jumped to the conclusion that Mr. Clayton had killed his wife, despite the absence of any blood on him and his providing an unimpeachable alibi (A 2358-59, 2557-75, 4485-4515). The police were so certain that he was the culprit that, although Mr. Clayton told them his daughter said that there had been a robber and that he had thousands of dollars in cash in two safes in the house (A 3347-49), they did not bother to investigate the safes that he had told them about (A 1740-42, 2264-67, 2298, 3041). When the baseless conclusion was disproved, the government urged that Mr. Clayton had hired Beard to commit the murder. But as best evidenced by the prosecutor's summation, there was no evidence of either such an agreement or that Mr. Beard received or expected to receive anything of pecuniary value to commit that crime.

In the absence of any proof of such an agreement or the proof of Mr. Clayton

providing something of value for the purpose of getting Mr. Beard to kill Mrs. Clayton, the prosecutor, in his summation, repeatedly urged the jury to speculate that Mr. Rays's testimony allegedly showing meetings between Mr. Clayton and Mr. Beard and the texts and calls between the two were not about trying to help Mr. Beard find work or getting papers needed for DSS or their other ostensible purpose, but were to further an agreement to murder Mrs. Clayton. First, the prosecutor argued that it was reasonable to infer that Mr. Clayton's texts to Mr. Beard about a water loss job (which is the remediation work they both did) was about going to a meeting (A 4909). Then he invited speculation that Mr. Ray's testimony that the two phones came together that day and that Mr. Clayton called his friend looking for work for Mr. Beard, was not because Mr. Clayton was "just a good guy helping out Mr. Beard," despite the prosecutor acknowledging that after this apparent meeting what Mr. Clayton did was call another friend inquiring if he had work for Mr. Beard (A 4910-11).

The prosecutor proceeded to urge the jury that the only reason that Mr. Clayton would meet with Beard, whom he had treated amicably in the past, would be to talk about murder, as opposed to talk about helping him be able to secure work by getting him a bicycle to get to a job (T 4267-68), or to help Beard secure work, or Beard's need for an eviction notice, despite texts showing those were the purposes of any

contact (A 4920-23, 4935, 4940-41).

Similarly, the prosecutor urged the jury to speculate, without evidence, that Mr. Beard's texts to Mr. Clayton asking him to call about a competing company's possession of stolen dehumidifiers and fans, texts from Clayton to Beard about providing him the eviction notice, and texts from Beard to Clayton about boxes, were all *really* about planning a murder (A 4927-34).

No explanation was proffered by the prosecutor as to why Mr. Clayton would evict Mr. Beard and his family at the time he was planning on hiring Beard to kill his wife. Such an action would hardly instill loyalty in Beard. In fact, it is much more likely that Tom's eviction of Beard and his family would trigger resentment along with Tom's acquiescence to Beard being fired. Indeed, after Beard was fired and evicted, he first texted his friend, Larry Johnson, complaining about the need to find a place to live and how Clayton wanted the rent money by Friday, but he did not have it (A 3737). On September 24, 2015, referring to the bosses who fired him, Beard texted Johnson "[y]o deez nasty buccras playing a dirty game, we need to talk about something." (A 3688-89).

Luke Tetreault's testified that he initiated the borrowing of Mr. Clayton's four wheeler on the Saturday prior to the murder and that the swapping of their trucks (which meant that the four wheeler would only have to be transferred once, not

twice), was something he and Mr. Clayton had done many times before (A 1820-25). The prosecutor nonetheless urged that Tom's suggestion that they swap trucks showed that the murder plan was already established (A 4935, 4941).

The prosecutor proceeded to ask the jurors to speculate, based on Mr. Ray's testimony as to the location of the phones, that when Mr. Clayton returned Mr. Tetreault's truck to ServPro on the evening of September 28,2015, Mr. Clayton knew that Mr. Beard was there and was going to take the truck (A 4944). Again, there was no proof that Mr. Clayton gave Beard the truck, just the prosecutor asking the jury to so speculate.

Similarly, the prosecutor asked the jury to speculate that the uneaten guacamole that had been in Mr. Tertreault's truck which the police never sought to retrieve and test might have been from Mr. Clayton's daughter. Apparently no reason to bother securing, testing, and presenting evidence if one can simply offer speculation as to what the testing would show.

Finally, the prosecutor argued that Mr. Clayton's use of the M & M Auto and of the Miller's landline phones on the day and night of the murder were proof of his conspiring with Beard (A 4943). The prosecutor urged that Mr. Clayton wanted to ensure that a post-crime examination of his phone would not show these contacts with Beard. This argument ignores the fact that a post-crime examination of Beard's

phone would reveal those calls. This argument simply ignored the testimony about the bad cell phone reception at M&M Auto in September, 2015, and that Mr. Clayton often used the phone there (A 1918-19, 4552-57, 4594-98, 4673-75), and the fact that Mr. Clayton's call at the Miller's was conducted in earshot of Mrs. Miller (A 1894-95). The prosecutor urged, without support, that the call from the Miller's was not about deer blinds, even though it followed a conversation about one of the poker players needing help in moving 300 pound deer blinds (A 1851, 3103, 3117-18, 4948-49).

In sum, the proof of an agreement between Mr. Clayton and Mr. Beard for Beard to kill Mrs. Clayton consisted largely of Mr. Ray's testimony suggesting that the two men met a few times in the week prior to the murder and the texts and calls between the them, none of which, even indirectly talked about killing Mrs. Clayton. Thus, without resort to conjecture and speculation, leaps in the logical gaps in the evidence, and the drawing of unwarranted conclusions, the evidence was insufficient to prove that Mr. Clayton and Mr. Beard had an agreement for Mr. Beard to commit murder.

The proof that the murder was procured by Mr. Beard receiving or expecting to receive anything from Mr. Clayton of pecuniary value was even weaker. The prosecutor argued that this element of the murder for hire charge was satisfied by

proof that after Mr. Beard was fired from ServPro and was evicted from his apartment by Mr. Clayton, Mr. Clayton (1) attempted to help Mr. Beard find work, (2) gave Beard a used bike to help get ot job interviews and work, and (3) renewed his offer to pay Mr. Beard's South Carolina fines which prevented Beard from getting a driver's license (A 4951-52).

All three acts, however, are consistent with Mr. Clayton seeking to help Mr. Beard secure employment after Beard was fired and evicted by Clayton. It requires a leap in logic and impermissible conjecture and speculation to conclude thatgiving Mr. Beard a used bike (somethng Clayton had done for Beard in the past) and making calls in an effort to find him some work would be sufficient inducement for Beard to kill Mrs. Clayton. There is simply no evidence or reasons to speculate that those actions by Mr. Clayton were in any manner connected to Mr. Beard's murder of Mrs. Clayton. Moreover, Mr. Clayton's eviction of Beard and his family can hardly be case as furthering Clayton's purported plot to induce Beard to kill his wife.

Even if credited, the prosecutor's arguments that Mr. Clayton's sexual relations with other women as to which there was no evidence that Mrs. Clayton knew or cared, and his doubling of the life insurance policies for himself and Mrs. Clayton at the suggestion of his insurance agent provided motive for the killing (A 4962-66), cannot fill in the gaps in the evidence as to an agreement to kill for something of

pecuniary value.

There was simply no evidence of any transfer or promise to transfer any sum of money or thing of value in exchange for Beard killing Mrs. Clayton. The prosecutor did not introduce Mr. Beard's bank records or any other financial records to establish a transfer of funds, presumably because they did not support the People's theory of the case. Thus, the evidence was legally insufficient as to this element (Compare, *People v Glanda*, 5 AD3d 945, 949 [3d Dept 2004] ["ample" evidence that parties planned and committed murder, and that "Pecararo agreed to participate in exchange for $15,000, a new pickup truck and a snowmobile"]; *People v Sabo*, 179 Misc2d 396 [NY Cty1998] [attempted contract murder evidenced by $10,000 payment and promise of another $15,000 when death confirmed]).

D. The Evidence Was Legally Insufficient to Convict Mr. Clayton of Intentional Murder in the Second Degree, as an Accomplice, as There Was No Evidence That Mr. Clayton Had the Requisite Intent to Support Accomplice Liability, or Assisted Mr. Beard in the Commission of the Offense

The evidence was insufficient to support the verdict that Mr. Clayton was guilty of intentional murder in the second degree as an accomplice. Penal Law § 20.00 states:

> [w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to

engage in such conduct.

Thus, in order to have convicted Mr. Clayton of intentional murder in the second degree as Mr. Beard's accomplice, the following elements would have to have been established: (1) Mr. Beard committed the crime of intentional murder in the second degree, (2) Mr. Clayton had the intent to commit the crime of intentional murder in the second degree, and (3) Mr. Clayton solicited, requested, commanded, importuned, or intentionally aided Mr. Beard in the attempted commission of intentional murder. The evidence presented failed to establish that Mr. Clayton had the requisite intent to commit the crime of intentional murder in the second degree, and that he otherwise solicited, requested, commanded, importuned, or intentionally aided Mr. Beard in killing of Mrs. Clayton.

First, there was no evidence which (even in the light most favorable to the prosecution) would establish a reasonable inference that Mr. Clayton had the requisite intent to commit the crime of intentional murder in the second degree. "Criminal intent requires a purpose or objective to be fixed in the mind" (*People v Rivera*, 184 AD2d 288, 291 [1st Dept. 1992] [internal citations and quotations omitted]). As the Second Department has noted:

> It is, by now, well settled that in order to hold an accessory liable for the crime committed by the principal actor, the People must establish, beyond a reasonable doubt, that the accessory possessed the mental culpability necessary to commit the crime charged, and that in

> furtherance thereof, he solicited, requested, commanded, importuned or intentionally aided the principal. While the People were not obligated to prove that the defendant fired the fatal shot in order to obtain a conviction, proof that the defendant harbored the specific intent to kill was critical to the People's case for [w]ithout adequate proof of a shared intent with the principal actor, there is no community of purpose and therefore no basis for finding [that the] defendant acted in concert with the actual shooter.

(*People v Cummings*, 131 AD2d 865, 866 [2d Dept 1987][internal citations and quotations omitted].)

Here, as in *Cummings*, there was no evidence presented which would allow a jury to draw a reasonable inference that Mr. Clayton had the intent to kill his wife. Nor was there any evidence which would allow a jury to reasonably infer that Mr. Clayton solicited, requested, commanded, importuned, or intentionally aided Mr. Beard in the murder of Mrs. Clayton.

The prosecutor's arguments that Mr. Clayton's sexual relations with other women, as to which there was no evidence that Mrs. Clayton knew or cared, and Mr. Clayton's doubling of the life insurance policies for himself and Mrs. Clayton at the suggestion of his insurance agent provided motive for the killing (A 4962-66), are similarly speculative and cannot fill the gaps in the proof as to the lack of an agreement to kill Mrs. Clayton for something of pecuniary value.

The evidence does not allow any permissible inferences, without resort to speculation and conjecture, that Mr. Clayton had the intent to commit intentional

murder in the second degree, and that he somehow aided Mr. Beard in the commission of the offense. The evidence clearly established that it was Mr. Beard who forced his way into the home, and killed Mrs. Clayton. There were no statements or commands from Mr. Clayton to Beard before the killing about the murder of his wife. Instead, all that the prosecutor asserted as proof of an agreement, were Mr. Ray's testimony about alleged meetings between Mr. Clayton and Mr. Beard, calls and texts between the two men, and the Mr. Clayton's swap of his truck with Mr. Tetreault and Mr Beard's alleged subsequent use of Mr. Tetreault's truck, and Mr. Clayton's attempts to help Beard, by trying to get his some work, giving him a used bike, and continuing to agree to pay the fines that ServPro and he had tried to pay in August (A 397-406). But, as detailed in Point I(C), *supra*, absent conjecture and speculation, there was no evidence that any such meetings, calls, or texts, the truck transfer, of the attempted assistance in getting Mr. Beard work had anything to do with the murder of Mrs. Clayton, that Mr. Clayton intended to have Mrs. Clayton killed, that Mr. Clayton and Mr. Beard entered into an agreement to have Mrs. Clayton killed, or that Mr. Clayton somehow solicited, requested, commanded, importuned, or intentionally aided Beard in the killing of Kelley Clayton.

Thus, Mr. Clayton respectfully submits that the evidence was insufficient to establish that, with the the intent to have Mrs. Clayton killed, Mr. Clayton aided Mr.

Beard in the commission of the intentional murder of Mrs. Clayton.

E. The Weight of Credible Evidence Does Not Establish that Mr. Clayton Committed the Crimes as Charged

Even if this Court were to find the evidence against Mr. Clayton legally sufficient when viewed in the light most favorable to the People, reversal is nonetheless required because the verdict was against the weight of the credible evidence.

The Court of Appeals had reaffirmed that "[u]pon defendant's request, the Appellate Division must conduct a weight of the evidence review (citations omitted)." (*People v Danielson*, 9 NY3d 342 [2007]). The Court explained that in conducting weight of the evidence review, the appellate

> ... court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt (citation omitted) . . . Necessarily, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt.

(*People v Danielson*, 9 NY3d 342, 348 [2007]).

The court has further explained that weight of the evidence review "recognizes that 'even if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further' " (*People v Cahill*, 2 NY3d

14, 57-58 [2003], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]). "If based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*People v Bleakley*, 69 NY2d at 495, quoting *People ex rel. MacCracken v Miller*, 291 NY 55, 62 [1943]), and decide whether the trier of fact has given the evidence the weight it should be accorded (*People v Mateo*, 2 NY3d 383, 410 [2004]). When performing a weight of the evidence de novo review, an intermediate appellate court, in effect, sits as a thirteenth juror and decides which facts were proven at trial (*People v Danielson*, 9 NY3d 342, 348-349 (2007); *People v Rayam*, 94 NY2d 557, 560 [2000]; *People v Covington*, 18 AD3d 65, 69 [1st Dept 2005]. As the Court of Appeals held,

> [n]ecessarily, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt. Sitting as the thirteenth juror, moreover, the reviewing court must weigh the evidence in light of the elements of the crime as charged to the other jurors....

(*People v Danielson*, 9 NY3d 342, 348-349 [2007]).

> As this Court recently explained
>
> > Concerned "about the incidence of wrongful convictions and the prevalence with which they have been discovered in recent years," the Court of Appeals has stressed the importance of the role of the Appellate

> Division in serving, "in effect, as a second jury," to "affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not *convinced* that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 116–117, [2011] [emphasis added]; see *People v Oberlander*, 94 AD3d 1459, 1459, [4th Dept. 2012]).

(*People v Carter*, 158 AD3d 1105, 1112 [4th Dept 2018].)

As detailed below, in this case there were serious problems with the People's proof which render the verdicts against the weight of the evidence. Additionally, as detailed below, this Court should reverse this judgment of conviction not only because the verdict was against the weight of the evidence, but also in the interest of justice because " 'there is a grave risk that an innocent man has been convicted' (*People v Kidd*, 76 AD2d 665, 668 [1st Dept 1980]; accord *People v Crudup*, 100 AD2d 938,939 [2nd Dept 1984]; *People v Lawrence*, 111 Misc2d 1027, 1033 [Sup Ct Kings Cty 1981])". (*People v Carter*, 63 NY2d 530, 536 [1984]).

Even if, contrary to Mr. Clayton's arguments set forth in the Point I(C) and (D) , this Court were to find a legally sufficient chain of inferences, in the light most favorable to the People, to prove that Mr. Clayton had procured Mr. Beard to murder Mrs. Clayton by offering something of pecuniary value, it nonetheless should exercise its obligation to vacate the guilty verdicts as against the weight of the credible evidence given the equal or even greater plausibility of other chains of inferences

(*see,* (*People v Carter*, 63 NY2d 530 [1984]; *People v Caston*, 60 AD3d 1147 [3d Dept 2009]).

Under a weight of the credible evidence analysis, the failure of the prosecution to disprove inferences inconsistent with guilt is a valid consideration for an appellate court (*People v Perser*, 67 AD3d 1048, 1049 [3rd Dept 2009], *lv denied* 13 NY3d 941, quoting *People v Romero*, 7 NY3d 633, 643 [2006]). Such scrutiny is especially critical in a case, such as Mr. Clayton's, premised entirely on circumstantial evidence because, "[c]ircumstantial evidence 'is of no value if consistent with either the hypothesis of innocence or the hypothesis of guilt. It is not enough if the hypothesis of guilt will account for all the facts proven' " (*People v Montanez,* 41 NY2d 53, 57 [1976] citing *People v Suffern*, 267 NY 115, 127 [1935]).

Michael Beard, the man who murdered Mrs. Clayton, had recently been fired by Mr. Clayton's company and evicted by Mr. Clayton. He had been at Mr. Clayton's house previously (R 1392-93, 1819-20) , where, according to prosecution witnesses the garage door and perhaps the house door were left unlocked when someone is home, and where a house key was kept in the garage (R 1768-72, 1820-24, 2163). Mr. Clayton showed off cash and talked openly about having lots of cash in his home (A 1378, 1630-31, 1640-44, 1858-65, 1872-73, 2844-45). When the police arrived at the Clayton home after the murder, Mr. Clayton told them that his daughter said that

there had been a robber. It is quite easy to understand how Mr. Beard, embittered both by being fired from Mr. Clayton's company and evicted, along with his family, by Mr. Clayton, would seek to steal money from the home of the wealthy Mr. Clayton who flaunted his money.

But the police, with a rush to judgment, were so quickly convinced, incorrectly, that Mr. Clayton had murdered his wife (A 3835-65), they didn't bother to check for the safes, or check the safes or the overturned table for forensic evidence which could have established that Mr. Beard had attempted to steal money before Kelley Clayton was killed during the burglary and attempted robbery (A 1740-42, 2264-67, 2298, 3041).

Similarly, the police did not even seek to retrieve the partially eaten food discarded from Mr. Tetreault's truck and to conduct forensic testing of the food, which could have confirmed the theory that the truck had been used in the killing (A 2031-35, 2518-19). Significantly, despite the bloody nature of the killing and the prosecution's theory that Beard left the murder scene in that truck, there was no trace of blood found in this truck (A 2034, 2462-65, 2488). A thorough examination of the truck for trace or latent evidence, such as fingerprints, found no such evidence (A 2533-2540). Also, the tire tracks at the Clayton house did not match the tires on Mr. Tetreault's truck (A 2234-43, 2499-2450) . Further undermining the theory that Mr.

Tetrault's truck was used to commit the murder, is the fact that it did not have an extra half cab with suicide doors and beige trim, like the truck that Mr. Blandford, who committed the crime with Mr. Beard, testified was used to commit the crime.

The police jumped to the conclusion that Mr. Clayton was the actual killer despite the absence of blood on his clothes and his easily verifiable, true, alibi. Their erroneous assumption, however, is no different than the speculation and conjecture pushed bu the prosecutor at trial to argue that Mr. Clayton hired Mr. Beard. The prosecutor claimed that the many texts and calls between Mr. Clayton and Mr. Beard were not about their ostensible subjects (possible work, the need for eviction papers, the stolen dehumidifiers), but, without any showing, were *really* about planning for the murder.

Further, as detailed in Point I(C), there was no evidence of an agreement between Mr. Clayton and Mr. Beard to kill Mrs. Clayton and no showing that Mr. Clayton procured the killing by giving or creating an expectation that he would give anything of value to Mr. Beard for killing Mrs. Clayton. The prosecutor failed to provide any evidence that any money was ever provided or was expected to be given to Mr. Beard by Mr. Clayton. There was evidence that the efforts to help the fired and evicted Mr. Beard obtain some work, or the giving of a used bicycle, as Mr. Clayton had done previously (A 1589, 1627-28), or Mr. Clayton's continued willingness to

pay Mr. Beard's South Carolina fines, which he and Brian Laing had both tried to pay a month earlier (A 2858-64, 4593-95, 4602-03), had any relationship to the killing of Mrs. Clayton.

The prosecutor's speculative arguments that these were the payments for the killing simply ignores how absurd it would be for Mr. Clayton to evict Mr. Beard and his family, causing them to seek emergency assistance from DSS, and to then immediately seek to hire Mr. Clayton to kill Mrs. Clayton in exchange for the some job leads, or a used bike, or for the payments of the South Carolina fines which Mr. Beard had left unpaid for years.

The numerous texts and calls from Mr. Beard to both Mr. Clayton and to ServPro regarding his need to quickly obtain documentation of his firing and of his eviction (A 2874-79, 3612-13, 3619, 3707-08, 3750, 3753, 3756-57, 4589-93) demonstrate how anxious Mr. Beard was about his family being evicted without money to live elsewhere. Beard's animus and resentment towards Tom about being fired and evicted was displayed in texts to his friend Larry Johnson complaining about being evicted and, referring to the bosses who fired him,"[y]o deez nasty buccras playing a dirty game, we need to talk about something." (3678-89). The theory that Beard would be simultaneously planning to murder Mrs. Clayton on behalf of Mr. Clayton, the person who evicted him and his family, for some job

references, a used bike, and the payment of his old fines, is not supported by *any* evidence, let alone the weight of the evidence.

Additionally, the evidence that Mr. Clayton's mother had been planning on visiting the Clayton family home on the night of the September 28, 2015, when the murder was committed, but at the last moment had, without telling Mr. Clayton, decided to delay the visit by a day (A 4730-71), further undermines the theory that Mr. Clayton had planned on the murder being committed that night.

Finally, the prosecution's assertions that the doubling of the life insurance policy on Kelley Clayton and Mr. Clayton's having sexual relations with numerous women, and his talk of being unsatisfied by Kelley and wanting to divorce her, do not upon examination, provide evidence of motive to commit murder, much less the commission of the murder itself.

The undisputed proof was that the insurance policies on both Mr. and Mrs. Clayton were initially purchased at the requirement of their mortgage holder and were collaterally assigned to him (A 4684). The increase of the value of the policies occurred in 2014, after a review suggested by their agent who, working for a new company, was able to double the value for only a slight increase in cost (A 2636-2678).

The fact that Mr. Clayton had for a long time engaged in sexual relations with women other than his wife did not provide a motive to kill his wife. These women with whom he had sex described these as no-strings attached sexual encounters and not as relationships or love affairs (A 2078-81, 2091-95, 3440). The facts he had joked with these women about wanting to divorce Kelley (A 2076-77, 2093-94) and had told women that he was not being sexually satisfied by Kelley (A 2143-44), but that he would not divorce her because she would take everything (A 3425) are more the things a flirtatious man says when cheating on his wife, than the statements of a man planning on murdering his wife. Critically, there was no evidence that Kelley Clayton was aware of Mr. Clayton's sexual liaisons or, if she was aware, that she confronted him about them. Indeed, the night before the murder, the Claytons went to a concert together with friends (A 3156) and the Claytons had texted with each other in an endearing manner when Mr. Clayton was in Ohio for work the preceding week (A 3812, 3898). In sum, there was no evidence that Mr. Clayton's desire to engage in sexual relations with other women was impeded by his marriage or created a need or desire to end his marriage.

In this case, as in *People v Carter* (158 AD3d 1105[4th Dept 2018]), in which this Court recently reversed a murder conviction as against the weight of the credible evidence, "there are too many unanswered questions for [this Court] to be

comfortable that the right person is serving a life sentence for the victim's murder." (*Id.* at 1113.). It is not enough to prove that a crime occurred; rather, it must be proved that the accused was the person who committed the crime. The proof here fails that test. Given the weak circumstantial evidence relied on by the People to prove that Mr. Clayton intentionally procured and assisted in the killing, it is urged that the verdicts were against the weight of the evidence (CPL § 470.15[5]).

In performing its responsibility of reviewing the jury's verdict, this Court ". . . must, like the trier of fact below, weigh the relative probative force of conflicting testimony and the relative strength of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony" (*People v Perser*, 67 AD3d 1048, 1049 [3d Dept 2009], *lv denied* 13 NY3d 941, quoting *People v Romero*, 7 NY3d 633, 643 [2006]). On this record, it is respectfully submitted that this weighing process leads inescapably to the conclusion that the prosecution failed to prove Tom Clayton's guilt beyond a reasonable doubt.

POINT II: REVERSAL OF MR. CLAYTON'S CONVICTION IS REQUIRED DUE TO THE COURT'S REFUSAL TO SANCTION THE PROSECUTOR FOR REPEATED ROSARIO AND DISCOVERY VIOLATIONS AND THE RESULTING SUBSTANTIAL PREJUDICE INCURRED WHICH DENIED MR. CLAYTON HIS RIGHT TO A FAIR TRIAL

A. Introduction

By enacting CPL Article 240, the legislature expressed its intent that a criminal trial "should not be a sporting event where each side remains ignorant of the facts in the hands of the adversary until events unfold at trial (*People v Copicotto*, 50 NY2d 222, 226 [1980]). Consequently, the discovery rules embody a philosophy of broad pretrial disclosure (see *People v DaGata*, 86 NY2d 40, 45 [1995]). The Court of Appeals has explained that this "enables a defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence" (*People v Copicotto*, 50 NY2d at 226). The Court has further explained that "a right sense of justice" entitles a defendant to inspect the prior statements of a prosecution witness, prior to cross-examination, whether or not his statements vary from his testimony on the stand (*People v Rosario*, 9 NY2d 286, 289 [1961]) and that CPL 240.45 [1] [a], requires that disclosure be made before the prosecutor's opening address in a jury trial (*People v Perez*, 65 NY2d 154, 159 [1985]).

In contravention of these oft stated fundamental rules aimed at achieving a fair

trial, the prosecutor's strategy to obtaining a conviction of Mr. Clayton included multiple instances of delayed and untimely disclosure of critical information and materials required to be disclosed pursuant to *Rosario* and CPL Article 240. The untimely disclosure eroded the ability of Mr. Clayton's counsel to counter the testimony of the People's witnesses. During jury selection the prosecutor repeatedly and inaccurately informed the court that all but twenty pages of *Rosario* material had been provided to counsel. Throughout the trial, however, it was revealed that, in fact, the prosecutor had not timely disclosed *Rosario* or CPL § 240.20 information regarding numerous witnesses.

As detailed below, it was only long after the opening statements that the prosecutor complied with and provided *Rosario* material regarding its witnesses, Kim Bourgeois, Mark Blandford, Richard Flood, Rebecca White, and Michael Lostracco. But, the most egregious and prejudicial discovery violations were those with respect to Sy Ray, the purported expert on plotting phone locations, whose testimony and evidence comprised, in the words of the prosecutor, the "crux of [the prosecutor's] case." (A 3945).

At trial, Mr. Clayton's counsel repeatedly directed the court's attention to the failure of the prosecutor to provide any materials relating to Mr. Ray that were required to be provided to counsel pursuant to both *Rosario* and CPL § 240.20. This

material included Mr. Ray's e-mails relating to this testimony, the annotated time-line he relied on for his analysis, the animation and the animation guide he prepared, and Google KMZ files, needed for the defense expert to be able to assist in both the cross-examination of Mr. Ray and to testify as to the fundamental faults with Mr. Ray's evidence. The prosecutor did not provide these materials until February 6-9, 2017, almost a month after the start of trial.

Additionally, as detailed below, despite repeated requests for the data analyzed by Mr. Ray, the Google data from Mr. Clayton and Mr. Beard, relied on by Mr. Ray (and thus, required to be disclosed pursuant to CPL § 240.20), was not timely provided. When finally providing this information, the prosecutor incorrectly claimed that the data relied on by Mr. Ray regarding Mr. Beard's phone was not required to be disclosed, but that the prosecutors were "providing it out of the goodness of our hearts." (A 1185.) As a consequence of the prosecutor only hiring Mr. Ray a few weeks prior to trial and having him conduct his scan tests mid-trial, the prosecutor did not provide defense counsel Mr. Ray's two reports or the data from scan tests until weeks into the trial, preventing the defense from obtaining the testimony of an expert to effectively refute these reports (A 3961-63) (see *People v Kelley*, 19 NY3d 887, 889–90 [2012], reversing, 82 AD3d 463, 464 [1st Dept 2011], which had held incorrectly that "[t]here was no discovery violation, because the applicable statute

(CPL 240.20 [1] [c]) governs the timing of the disclosure of test results demanded by the defense, not the timing of the tests").

As trial counsel explained, in seeking to preclude Mr. Ray's testimony, the prejudicial impact of the failure to timely provide information regarding Mr. Ray was overwhelming, because Mr. Clayton was placed in a position where he could not retain an expert who could have either testified on Mr. Clayton's behalf or assisted in preparing for the cross-examination of Mr. Ray (A 3961-63). After preclusion was denied and the further *Rosario* violations regarding the failure to disclose documents prepared by Mr. Ray was brought to the court's attention, the court refused the request for permission to sanction the prosecutor by allowing counsel to cross-examine Mr. Ray outside the presence of the jury and to then, based on the testimony elicited, determine the proper sanction (A 4066-68).

As detailed below, the court's rulings permitting Mr. Ray to testify and denying the requested cross-examination outside the presence of the jury to determine a proper sanction, impermissibly rewarded the prosecutor's pattern of delayed disclosure which caused Mr. Clayton substantial prejudice and denied him a fair trial. The cumulative consequence of the late provision of discovery grossly impeded the efforts of defense counsel to prepare to defend Mr. Clayton in a murder in the first degree prosecution.

B. The Repeated Requests for Timely Disclosure and the Prosecution's Repeated Violation of its Disclosure Obligations

1. The Prosecution's Pattern of Discovery Violations

Having already made a timely pre-trial demand for discovery, during jury selection counsel inquired if he had received all of the *Rosario* material. He was told by the prosecutor that all but twenty pages had been provided (A 877). Still during jury selection, counsel noted that the warrant applications he received stated that the Google information for both Mr. Beard and Mr. Clayton had been provided to the prosecution and in a December, 2016 motion he had sought the raw data from the phones. Yet that information had not been disclosed to the defense as detailed in Point IV[C], *infra* (Google location information for both Mr. Beard and Mr. Clayton comprised a portion of the data analyzed by Mr. Ray, disclosure was required pursuant to CPL § 240.20[1][c]). The prosecutor initially replied that Mr. Clayton was not entitled to Mr. Beard's data (relied on by Mr. Ray) and that he did not have Mr. Clayton's data. When reminded of the document stating that Mr. Clayton's data had been provided, the prosecutor agreed to look for it. (A 969-74).

Counsel then informed the court that although the prosecutor claimed that all but twenty pages of *Rosario* materials had been provided, no material had been provided as to 39 witnesses on the prosecutor's witness list, including Mr. Ray. The prosecutor responded that he had no reports yet from Mr. Ray who was analyzing

certain materials. Counsel correctly answered that he was entitled to Mr. Ray's *Rosario* material *prior* to opening statements and appealed to the court asking for fairness. The court replied that there would be sanctions if discovery requirements were violated, but that the court would not tell the prosecutor what to provide (A 975-79). Counsel then noted that he had not yet been provided the plea agreement for Mark Blandford, witness for the prosecutor, who had been charged with Kelley Clayton's murder and had pleaded guilty to manslaughter (A 979).

When counsel urged that he was entitled to receive the raw Google location data for Mr. Beard (which was being analyzed by Mr. Ray) pursuant to CPL Article 240 and that he had not yet received it, the court ordered that it be provided as soon as possible (A 1002-06).

At the conclusion of jury selection, the prosecutor stated that he would provide more *Rosario* material before the next morning's openings, but was not sure yet how much. The prosecutor also informed the court that his expert (Sy Ray) was reviewing 80,000 bits of evidence from Google, Verizon, and AT&T, but there was no report yet (which does *not* obviate the duty to turn over any materials reviewed or any documents prepared by the expert) (A 1169-70). The next morning counsel reported that at 4 a.m. he received an e-mail with over 1000 pages of Rosario for 30 witnesses, comprising four discs of materials (not the twenty pages he had been told to expect).

The prosecutor responded that the Google and AT&T data were technically not *Rosario* material (A 1182-88). Still no *Rosario* materials were provided as to Mr. Ray (A 1435). After openings and during the examination of witnesses, it became apparent that the prosecutor had failed to provide *Rosario* materials for numerous other witnesses.

During the cross-examination of Mark Blandford, who had pleaded guilty to the reduced charge of manslaughter in the second degree in the killing of Kelley Clayton, defense counsel for the first time learned that Mark Blandford had been video recorded taking a polygraph examination responding to questions, and that counsel had not been provided any information regarding the examination or with a copy of the video recording. Despite such material clearly being required to be provided pursuant to *Rosario* (*People v Rutter*, 202 AD2d 123, 130–32 [1st Dept 1994]; *People v Mondon*, 129 Misc2d 13, 16 [NY Co SCt 1985]) and CPL § 240.20(1)(c); *People v Kogut*, 6 Misc3d 1011(A) [Nassau Co Sct 2004]), the prosecutor expressed surprise that this was *Rosario* material and then complained that it was "nonsense" that he would not be able to call any other witness until the materials were provided and the cross-examination of Mr. Blandford could be completed (again, this was during the cross-examination of Mr. Blandford) (A 1525-28). Counsel spent the evening watching the four and a half hours long video

(meaning he could not otherwise prepare for cross-examination). In the morning he received a package from the prosecutor containing even more *Rosario* material regarding Mr. Blandford's polygraph examination. The prosecutor, citing no cases, replied that Mr. Clayton was not entitled to the materials which had been belatedly provided upon counsel's in-court demand (A 1538-39).

Rosario material regarding Kim Bourgeois was also provided at noon on January 17, 2017, five days after opening statements, despite the prosecutor intending to call her as a witness (A 1528, 1531). Nearly a month later, on the evening of February 13, 2017, more *Rosario* material for Ms. Bourgeois was provided. The prosecutor claimed that these prior statements were not necessarily *Rosario* as they didn't pertain to specific topics that would be asked by the prosecutor on direct examination (A 4311-18). No case law was or can be cited for the proposition that the obligation under *Rosario* is limited solely to materials as to which the prosecutor would be asking specific questions on direct examination. The very purpose of *Rosario* is to insure that the defendant has access to that material for impeachment purposes during cross-examination (*People v Rosario*, 9 NY2d 286, 289; *People v Poole*, 48 NY2d 144, 149 [1979]). Ultimately, the prosecutor was precluded from calling Ms. Bourgeois as a witness, not because of the *Rosario* and CPL § 240.45 violations, but because, over defense objections, the prosecutor had successfully

urged the court to permit her to sit through the trial (A 4328-29).

During the testimony of Rebecca White, an engineer with a telephone company called to present relevant call records, counsel protested that he had never been provided with the documents which the prosecutor was seeking to introduce (as to which the calls were not listed sequentially). When the prosecutor responded that the defense investigator was able to look at exhibits from Mr. Beard's trial (but not make a copy), counsel replied that was not the same as the prosecutor providing the materials to counsel. The prosecutor, again citing no case law or theory, then denied that there was any obligation to provide such documents in discovery (A 1936-39).

Rosario material with respect to Investigator Michael Lostracco was provided *after* cross-examination was over. Despite counsel repeatedly stating the documents had not been provided, the prosecutor's explanation for that failure was that she thought the documents had been sent but was unable to find a letter showing that, in fact, they had been sent (A 2689-2691).

Late afternoon on February 13, 2017, more than a month after opening statements, the prosecutor sent counsel 300 pages of *Rosario* material from a prospective witness, Richard Flood, the insurance agent who sold Mr. Clayton homeowner's insurance, whom the prosecutor intended to call as a witness to show no claim was made for cash missing from the lockbox under the bed (which the

defense urged had been robbed when Kelley was killed). Counsel stated that he would have approached his questioning of witnesses about the lockbox differently if he had this material and urged that it was fundamentally unfair to permit Flood's testimony *after* this evidence was provided so late (A 4311-15). After the prosecutor responded that not all of the material provided was *Rosario* material (A 4321-24), the court permitted Mr. Flood to testify without imposing any sanction (A 4319).

2. Sy Ray Discovery Violations

The most egregious discovery violations, however, were made with respect to Sy Ray, the People's expert who claimed to be able to track the locations of Mr. Clayton and Mr Beard based on cell phone location and other data. The prosecutor's pattern of *Rosario* violations, puts these violations, substantial in and of themselves, in proper perspective. Mr. Ray had only been retained about two weeks prior to the trial. His preliminary report was not provided to defense counsel until the evening of January 17, 2017, and his supplemental report was not provided to counsel until the evening of January 25, 2017, two weeks after testimony began (A 333, 2689, 3944-45). On February 6, 2017, the prosecution provided counsel with a Google KMZ file used by Mr. Ray as a basis for his testimony. On February 7, 2017, the prosecutor provided counsel with Mr. Ray's CV and additional files, and some e-mails from Mr. Ray, and the scan data (A 334, 3937, 3944-45, 3962).

Pointing out that all of this material was required to have been previously provided, defense counsel then moved to preclude Mr. Ray from testifying since he did not have sufficient time to retain a defense expert. As an alternative sanction, counsel moved to preclude Mr. Ray's use of his thumb drive and pictorial depiction (A 3962-63). The court allowed the testimony to proceed, noting that the objections are on the record (A 3966-67).

On February 9, 2017, during Mr. Ray's direct examination, counsel noted and objected to yet another *Rosario* violation. Counsel explained that the previous night while reviewing the *Rosario* document he had been belatedly provided on February 7, 2017, he noticed that Mr. Ray referred to having provided the prosecutor with an excel spreadsheet he had prepared, an animation, and timeline, as to which, Mr. Ray wrote that he had annotated the timeline with notes. Since none of those materials had been provided to counsel, counsel immediately e-mailed the prosecutor about this omission at 7:54 p.m. and again at 11:46 p.m., describing the documents and stating that they were discoverable both under CPL 240 and under *Rosario*.

In response, on the morning of February 9, 2017, the prosecutor finally provided the timeline, the animation, and the KMZ file. Counsel asked for an opportunity to question Mr. Ray outside of the jury to see if there were any other e-mails or documents that still had not been provided (A 4058-61). In opposing this

request, the prosecutor first argued that e-mails are not *Rosario* because they are not written reports (citing no case law for that proposition) and then, without any documentary support, claimed that this material had all been sent previously (A 4062-64).

Defense counsel strongly denied that claim, again stating that he had never been provided the animation before and that he received the e-mails on February 7, 2017. He again noted how one of the e-mails referred to the attached excel spreadsheet, a timeline on which Mr. Ray had written notes, and guide for using the excel file in Google Earth, none of which he had been provided. Counsel expressly argued that he was entitled to these materials under both *Rosario* and CPL 240 because he is entitled to all the records and data used to create the final report.

The prosecutor disputed that CPL 240 requires such material to be provided (A 4064-65). Counsel then reviewed his attempts to obtain discovery relative to Mr. Ray, how, despite those efforts, the material just trickled in belatedly, and how difficult this made it for him to effectively cross-examine Mr. Ray. Defense counsel urged that he be allowed to question Mr. Ray for a few minutes outside the jury for the court to determine the appropriate sanction for the discovery violation, urging that a mere adjournment is an inadequate remedy (A 4065-68). The prosecutor responded that counsel now had the material so no other sanction was required (A 4069-70). The

only response by the court for these repeated discovery violations was to start the afternoon session a little later than usual (A 4073, 4078).

C. The People's Repeated and Purposeful Failures to Comply with Disclosure Obligations Regarding Sy Ray Resulted in Substantial Prejudice to Mr. Clayton

As described in Point IV(B), Mr. Clayton was not provided with Mr. Ray's reports analyzing location data, the data he relied on, his excel spreedsheets, his email about his work on this case, the timeline he used and annotated, or the animation he created of his findings, until long after opening statements. Yet, all of the materials were required to be disclosed under *Rosario*, CPL § 240.20 and CPL §240.45 much earlier. As a consequence of these discovery violations, Mr. Clayton was deprived of the time needed to call an expert who had an opportunity to analyze and refute Mr. Ray's findings purportedly showing Mr. Clayton and Mr. Beard together at key times (which as explained in Points II and III, *supra*, were not based on scientifically reliable methods and were not supported by the underlying data).

Thus, the prosecution was able to use Mr. Ray's testimony to successfully transform a weak circumstantial case lacking any evidence that Mr. Clayton contracted with and paid Mr. Beard to kill Kelley Clayton, into a successful prosecution of an innocent man. Phrased differently the guilty verdict was the product of the combination of the prosecution's last-minute hiring of Mr. Ray, the

prosecutor's consistent refusal to provide counsel timely information about Mr. Ray and his analysis. The lower court's failure to impose any sanction for these discovery violations constitutes reversible error.

As described in Point IV(B), these discovery violations regarding Mr. Ray were the culmination of a series of discovery violations as to numerous other witnesses which cumulatively resulted in a trial by ambush, with defense counsel, who would have otherwise been able to mount a defense to the ultimate charge of murder in the first degree, being repeatedly forced to divert precious time from the orderly preparation of cross-examination to review and respond to the late production of discovery material.

Over thirty years ago, the New York Court of Appeals held that "a right sense of justice entitles the defense to examine a witness' prior statement, whether or not it varies from his testimony on the stand." (*People v Rosario*, 9 NY2d 286, 289 [1961].) That holding was later codified in New York Criminal Procedure Law §240.45(1)(a), which states that "after the jury has been sworn and before the prosecutor's opening address," the prosecutor shall turn over to the defense "any written or recorded statement, including any testimony before a grand jury . . . which relates to the subject matter of the witness's testimony."

Additionally, courts have broadly interpreted CPL 240.20(1)(c), which requires

the prosecution to disclose any documents used in the preparation of reports or related to the specific tests of items in a defendant's case. Relying on the holding in *People v DaGata* (86 NY2d 40 [1995]), numerous courts have held that the prosecution must disclose any notes, data, or documents used in the preparation or formulation of reports or related to the specific tests of items in a defendant's case (see *People v DaGata*, 86 NY2d 40, 44–45; *People v Jones*, 55 Misc3d 743, 748, 753-53 [Bronx Co S Ct 2017]; *People v Alvarez*, 38 AD3d 930, 933–34 [3d Dept 2007]; *People v Gills*, 52 Misc3d 903, 908–09 [Queens Co S Ct 2016].

In *DaGata*, the Court of Appeals held that although the laboratory notes sought in the case may not implicate *Rosario* in the traditional sense, they were required to be disclosed since "consistent with this State's philosophy of broad pretrial disclosure," the defendant could have used them to challenge the methodology of the government's expert (*People v DaGata*, 86 NY2d 44-45).

DaGata and its progency, along with CPL § 240.20(1)(c), make clear that all of the materials related to Mr. Ray were required to be disclosed prior to opening statements. The reason that the prosecutor cited no cases in support of his claims that he was not required to produce Mr. Rays's e-mails, the annotated timeline, the animation he created, and the data he analyzed, is that those arguments were so clearly baseless and contrary to clear and controlling law that no cases support those

positions.

Further, the prosecutor's argument that he had no duty to provide Mr. Ray's reports prior to opening statements because he had only hired Mr Ray shortly before trial and the reports were not completed until mid-trial cannot excuse either the prosecutor's failures to disclose the other documents it possessed about Mr. Ray and his analysis, nor the admission of Mr. Ray's testimony based on those reports.

First, when, as here, a prosecutor waits until the eve of trial to hire an expert to prepare reports mid-trial, and the prosecutor will be seeking to present the expert to testify about these mid-trial findings, the court's duty is to protect a defendant's right to a fair trial by minimizing the prejudicial impact of late disclosure of reports (*People v Kelley*, 19 NY3d 887, 889–90 [2012]). That means, in part, that the court has to be vigilant about the prosecutor's duty to comply with *Rosario* and CPL 240 requirements. It means that if the late production of the reports prevents the defendant from timely responding to critical evidence, the court must preclude the admission of such evidence (*Id.*). Thus, when informed that Mr. Ray was an expert whose reports were not yet complete, defense counsel correctly urged that he was at least entitled to Mr. Ray's *Rosario* material prior to opening statements and appealed to the court asking for fairness. The lower court, however, refused to order any disclosure about Mr. Ray (A 978-79) and then failed to impose any sanctions for the late disclosure of

required discovery.

"The purpose of pre-trial discovery is to allow the defendant to prepare for trial and avoid trial by ambush" (*People v Irons*, 20 Misc.3d 1127(A) [Kings County Crim Ct 2008] [citing *People v Robinson*, 53 AD3d 63, 67 [2nd Dept.2008]; see *People v White*, 45 Misc3d 694, 698 [NY Crim Ct 2014]). The Court of Appeals has explained that by enacting CPL 240, the legislature expressed its intent that a criminal trial "should not be a sporting event where each side remains ignorant of the facts in the hands of the adversary until events unfold at trial (*People v Copicotto*, 50 NY2d 222, 226 [1980]).

Rather than attempting to mitigate the prejudicial impact of the late retention of Sy Ray and even later production of Mr. Ray's crucial reports, the prosecutor did the opposite. The prosecutor refused to even inform counsel what Mr. Ray would be testifying about until January 13, 2017, after opening statements. Still no *Rosario* materials were provided as to Mr. Ray until much later (A 1435). Critical information pursuant to *Rosario* and CPL 240.20 was not provided until February 9, 2017, seven weeks after Mr Ray was retained and a month after the commencement of trial (A 4058-64). It took Mr. Ray a full month of work using his proprietary program to conduct his analysis and complete his reports. The People refused to share any information about Mr. Ray's customized program and methodology with defense

counsel.

Thus, the prosecutor exploited his last minute hiring of Mr. Ray by willfully failing to provide any information about Mr. Ray, the data he relied on, his methodology, and the documents he produced other than the report, rendering it impossible for Mr. Clayton and his counsel to be able to consult with and call an expert to refute Mr. Ray's unreliable analysis which produced results not supported by the data.

Not surprisingly, Mr. Clayton's expert who was never provided access to information as to the algorithms used in Mr. Ray's custom-designed program (and, thus, needed to reverse-engineer the reports and data to see if Mr. Ray's analysis accurately and reliably described the data), was unable to drop his other work, complete his analysis, and testify at the trial.

Accordingly, Mr. Clayton moved to preclude Mr. Ray from testifying since Mr. Clayton did not have sufficient time to retain a defense expert to refute this critical evidence. As an alternative sanction, counsel moved to preclude Mr. Ray's use of his thumb drive and pictorial depiction (A 3961-64). Later, when finally provided the emails, Google KMZ files, excel spreadsheets, and animations, counsel unsuccessfully sought to be allowed to cross-examine Mr. Ray outside of the jury for the court to determine the appropriate sanction (A 4065-68).

D. The Court Erred in Not Precluding Mr. Ray's Testimony or Imposing Other Sanction for the Discovery Violations

CPL 240.70(1) and the decisions in *People v Kelley* (19 NY3d 887, 889–90 [2012] and *People v Davis* (52 AD3d 1205, 1205–07 [4th Dept 2008]) are instructive as to what sanctions could have and should have been imposed.

CPL 240.70(1) provides that "[i]f ... the court finds that a party has failed to comply with any of the provisions of [CPL Article 240], the court may order such party to permit discovery of the [evidence] not previously disclosed, grant a continuance, issue a protective order, prohibit the introduction of certain evidence or the calling of certain witnesses or take any other appropriate action." In determining an appropriate remedy for the People's failure to disclose evidence, the court may consider the degree of prosecutorial fault, "but the overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society" (*People v Kelley*, 62 NY2d 516, 520 [1984]). The New York Court of Appeals has held that reversal is required when the delay in turning over those materials has "substantially prejudiced the defendant." (*People v Banch*, 80 NY2d 610, 616 [1992].) "Substantial prejudice" was clearly demonstrated in this case.

This Court explained in *People v Davis* (52 AD3d 1205, 1206–07 [4th Dept 2008]) that "[i]n measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate

action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached." (*Id.*, quoting *People v Mott*, 94 AD2d 415, 419 [4th Dept 1983].)

In Mr. Clayton's case, the delayed disclosure of critical information needed to counter the People's surprise expert witness who supplied the "crux" of the People case, was severe misconduct, preventing Mr. Clayton from effectively refuting this testimony. As discussed in Point IV, *infra*, Dr. Jovanovic's affidavit filed with the 330 motion shows how, if provided a fair opportunity, Mr. Clayton would have been able to present to the jury the unreliable nature of Mr. Ray's testimony and materials. Given the prosecutor's own words as to how critical Mr. Ray's evidence was to the People's case, the prejudicial impact of the late disclosure could hardly have been greater. For the reasons described in Point IV, *supra*, the outcome of this case would have been different if Mr. Clayton had been able to present Dr. Jovanovic as a defense expert in response to Mr. Ray.

Given the pervasive and recurrent nature of the prosecutor's discovery violations, not just with Mr. Ray, but as to Kim Bourgeois, Mark Blandford, Richard Flood, Rebecca White, and Michael Lostracco, despite repeated complaints by counsel about the failure to provide discovery, the violations could hardly have been more frequent or purposeful. As counsel correctly described it, instead of being

timely provided, the required discovery "trickled in" throughout the trial (A 4068).

The lower court imposed no sanctions. Perhaps the court was relying on the prosecutor's inaccurate assertion that Mr. Ray merely plotted the data points provided by the carriers, a step he testified took his program only a couple of minutes to automatically complete (A 3971). In contrast, it took Mr. Ray nearly a month to prepare his two reports. It should be noted that the prosecutor did not provide this computer produced file of data points prior to opening statements, as required by *Rosario*, CPL § 240.20 and CPL § 240.45.

Given that "the overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society" (*People v Kelley*, 62 NY2d 516, 520), reversal is required since each and every one of the factors listed by this Court in *Davis* establishes substantial prejudice, compels reversal.

In *Davis*, this Court reversed a conviction because the prosecutor repeatedly delayed delivery of scientific reports and related documents and the trial court had denied requests for adjournments. Finding that the scientific evidence requested by defendant could have been used "to determine whether further inquiry would possibly lead to information favorable to defendant's case" the Court reversed the conviction upon a finding that the People's conduct resulted in substantial prejudice to defendant (*People v Davis*, 52 AD3d at 1205–07).

In *People v Kelley*, 19 NY3d 887, 889–90 [2012], the Court of Appeals held that it was reversible error to admit the results of forensic testing conducted mid-trial, despite the absence of any purposefulness by the prosecutor in the late testing and despite the defendant being given an opportunity to address the new evidence at trial because the substantial prejudice suffered by the defendant violated his right to a fair trial. As in Mr. Clayton's case, the new evidence in *Davis* was the strongest evidence to support the prosecution's theory and there was no way to effectively refute the evidence by the time it was produced. Thus, the *Davis* Court held that the trial court should have precluded the submission of that evidence.

Judge Smith, in his dissenting opinion, agreed that "the belated testing of the towel was a violation of CPL 240.20 (1) (c)." He explained that "[t]he statute does not require the People to test anything—only to make available such tests as they have—but when, *as here, the People delay the testing until well after the trial has begun, the effect is to defeat the purpose of the statute. If the People had done this deliberately, I might agree with the majority that the trial court should have precluded the results of the test* , or ordered a mistrial." (*People v Kelley*, 19 NY3d 887 [J. Smith, dissenting] [2012] [emphasis added].) Thus, the entire Court, including the dissenting judges, agreed that admitting prejudicial mid-trial test results effectively violates the purpose of CPL § 240.20. The only disagreement was whether

the fact that the late testing was the result of a mistake and not purposeful should impact the remedy. In Mr. Clayton's case, the withholding of information about Mr. Ray's testing and methodology and the *Rosario* violations regarding Mr. Ray show that the prosecutor was seeking to impermissibly benefit from its eleventh hour decision to hire Mr. Ray to try to bolster a weak case.

In this regard, it bears emphasis that the Court of Appeals decision in *Kelley*, reversed the holding of the Appellate Division, First Department, that "[t]here was no discovery violation, because the applicable statute (CPL 240.20 [1] [c]) governs the timing of the disclosure of test results demanded by the defense, not the timing of the tests" and there was no requirement to turn over a report that did not exist. (*People v Kelley*, 82 AD3d 463, 464 [1st Dept 2011]).

In *People v Thompson* (71 NY2d 918 [1988]), the Court reversed a conviction because the delay until mid-trial in turning over *Rosario* materials caused substantial prejudice by undermining the defense. Defense counsel in *Thompson* had constructed a strategy around "inconsistencies between complainant's initial version to the police and her later testimony." (*Id.* 919.) Then, on redirect examination of another witness, the prosecutor elicited testimony that coincided with a memo book entry written shortly after the incident that had not been disclosed to the defense and that was similar to the complainant's trial testimony. The defense, pursuing that inquiry,

learned for the first time of the memo book entry, confirming that the trial version was not a recent fabrication, but had been given to the police much earlier. The Court of Appeals held that the People's delay which caused the statement to be revealed only after defense counsel had moved forward on a strategy that depended on the statement's nonexistence, substantially prejudiced the defense (*Id.* 920).

Mr. Clayton similarly suffered prejudice because the delay in providing information about Mr. Ray's analysis and methodology resulted in an inability to effectively refute the prosecution witness whose testimony placing Mr. Clayton and Mr. Beard together at critical times, proved fatal to the overall defense strategy, which had been firmly implemented throughout the trial of urging that this was a purely circumstantial one linking needed evidence of agreement between Mr. Clayton and Mr. Beard.

After denying the request to preclude Mr. Ray's testimony, counsel brought to the court's attention numerous additional discovery violations regarding Mr. Ray, involving his undisclosed e-mails, excel spreadsheets, animations, annotated timeline, and Google KMZ files and sought to be allowed to cross-examine Mr. Ray outside of the jury for the court to determine the appropriate sanction (A 4065-4068). No such cross-examination or sanctions were ordered.

The court had a full range of options as to what constituted an appropriate

sanction pursuant to CPL § 240.70(1), such as (1) precluding testimony regarding the animation and its admission, (2) giving an adverse inference instruction regarding the prosecutor's repeated violation of its discovery obligations (see, *People v Hill*, 266 AD2d 929, 929 [4th Dept 1999]), and/or (3) limiting topics and conclusions that Mr. Ray could address in his testimony (*People v Castillo*, 178 AD2d 113, 115–16 [1st Dept 1991]). By imposing no sanction, the prosecutor's strategy of delay in providing discovery was rewarded and the jury received all of Mr. Ray's prejudicial evidence without an adequate ability of Mr. Clayton's counsel to counter it at the late date. Given the importance of this evidence and the prejudicial impact it had on Mr. Clayton, as well as the pattern of discovery violations, it was an abuse of discretion to fail to impose a sanction that reduced this prejudice and enable Mr. Clayton to have the fair trial to which he was constitutionally entitled. Harmless error analysis does not apply to error which deprives a defendant of a fair trial (*People v Crimmins*, 36 NY2d 230, 238 [1975]). Even if this Court finds that Mr. Clayton's constitutional right to a fair trial was not violated, given the weak proof of Mr. Clayton's guilt, there was no overwhelming evidence of guilt, and, thus, harmless error analysis does not apply (*Id.* at 241 ["We observe that in either instance, of course, unless the proof of the defendant's guilt, without reference to the error, is overwhelming, there is no occasion for consideration of any doctrine of harmless error"]).

POINT III: THE ADMISSION, WITHOUT A HEARING, OF UNRELIABLE AND NOVEL SCIENTIFIC OPINION EVIDENCE DERIVED FROM THE WITNESS'S ANALYSIS USING A PROPRIETARY PROGRAM HE DEVELOPED AS TO THE SPECIFIC LOCATIONS OF TELEPHONE DEVICES AND DRIVE TEST SCANNING CONDUCTED 16 MONTHS AFTER THE CALLS IN QUESTION, WHICH WERE NOT BASED ON ACCEPTED AND RELIABLE METHODOLOGIES ACCEPTED WITHIN THE RELEVANT SCIENTIFIC OR TECHNICAL COMMUNITY WAS PREJUDICIAL ERROR WHICH DEPRIVED MR. CLAYTON OF HIS RIGHT TO A FAIR TRIAL

A. Introduction

New York adheres to the standard for the admission of expert testimony regarding a novel scientific technique first articulated in *Frye v United States* (293 F 1013 [DC Cir 1923]) (*People v Wernick*, 89 NY2d 111, 115 [1996]; *People v Wesley*, 83 NY2d 417 [1994]). The *Frye* Court held that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Frye* at 1014.)

Applying the *Frye* test, New York courts permit expert testimony based on scientific principles, procedures, or theories only after the principles, procedures, or theories have gained general acceptance in the relevant scientific field (*see People v*

Wesley, 83 NY2d 417). Under the *Frye* test, the burden of proving general acceptance rests upon the party offering the disputed expert testimony (*Del Maestro v Grecco*, 16 AD3d 364 [2d Dept 2005]). The New York Court of Appeals has characterized this standard as requiring a determination of "whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." (*People v Wesley*, 83 NY2d 417, 422 [1994].) Further, a trial court may preclude an expert from offering opinions not based on generally-accepted science (*People v Berry*, 27 NY3d 10, 18-21 [2016]; *People v Wernick*, 89 NY2d 111, 115 [1996]; *Cornell v 360 West 51st Street Realty*, 22 NY3d 762, 780-786 [2014]).

As detailed below, the court below committed reversible error in admitting expert testimony of Sy Ray and exhibits, including an animation, which the prosecutor correctly described as "the crux of this case" (A 3945), regarding the locations of Mr. Clayton and Mr. Beard's telephones at critical times without first conducting a *Frye* hearing, as requested, to determine whether: (1) this evidence was based on an analysis which had acceptance of reliability within the relevant scientific community and (2) the methods of analysis were appropriately applied to establish a foundation for the admission of this evidence. In fact, there was no showing that the testimony and exhibits, which were derived from a proprietary program he developed as to the specific locations of telephone devices and drive test scanning conducted 16

months after the calls in question, were based on accepted and reliable methodologies accepted within the relevant scientific or technical community.

Trial counsel for Mr. Clayton, in his motion papers and oral argument, specifically and vigorously contested the scientific community's acceptance of the prosecution expert's methodologies and sought a hearing to examine the government's expert witness on these principles and the scientific reliability of the evidence. The proffered testimony Mr. Ray was aimed at filling obvious gaps in the People's case. In the absence of evidence of the charged agreement between Mr. Clayton and Mr. Beard, the man who killed Kelley Clayton, such "expert" testimony was critical to proving the People's case. Yet, this evidence was admitted without a hearing, despite the evidence being specifically challenged as junk science based on faulty data and data manipulation. As such, the trial court failed in its gatekeeper responsibility to keep unaccepted science out of the court room.

Indeed, as detailed below, if a hearing had been held, Mr. Clayton would have been able to present expert testimony that the proffered evidence was based on (1) source data without the requisite indicia of reliability; and (2) a misleading extension and manipulation of such data "to show conclusions that are not supported in raw data and in some instances represent apparent manual alterations of the data" in contravention of "basic principles of scientific inquiry, repeatability, reliability and

integrity." (A 360). Thus, as detailed below, the refusal of the lower court to conduct a *Frye* hearing and the admission of this unreliable and novel scientific opinion evidence of a kind not generally accepted in the field was prejudicial error which deprived Mr. Clayton of his right to a fair trial as guaranteed by both United States and New York constitutions (US Const Amend XIV; NY Const Art 1, § 6) .

B. The Prosecutor Relied on Sy Ray's Purported Status as an Expert to Establish the "Crux" of Its Theory of Prosecution Against Mr. Clayton

As Mr. Clayton's trial approached, the prosecutor evidently recognized that the proof that Mr. Clayton hired Beard to kill his wife was based entirely on circumstantial evidence which, in turn, was dependent on conjecture and speculation. Mr. Clayton had not given law enforcement, or any other third parties, inculpatory statements. No witness claimed to have observed or overheard any inculpatory discussion between Mr. Clayton and Beard regarding either the commission of such crime or compensation for the killing. No texts or e-mails or writings between Mr. Beard and Mr. Clayton discussed the commission of such crime. Beard, the actual killer, would not be testifying. No witness would testify to have heard Mr. Beard claim that he would or did kill Kelley Clayton at Mr. Clayton's behest. Mr. Clayton did not transfer any money to Mr. Beard and no money from Mr. Clayton was found in Mr. Beard or his family's possession. To the contrary, Mr. Clayton was evicting Mr. Beard and his family from their apartment co-owned by Mr. Clayton for failure

to pay rent. The prosecutor knew it would not be able to present any direct evidence that Mr. Clayton sought to have Mr. Beard kill his wife or that Mr. Clayton and Mr. Beard had entered into an agreement for Mr. Beard to commit such a crime.

So at the very end of December, 2016, fifteen months after Kelley Clayton's murder, and only three weeks before the trial commenced, the prosecutor, through the police, reached out to Sy Ray (A 4136-37), a retired police officer from Gilbert, Arizona, with only an Associate's Degree in Criminal Justice (A 4102). Mr. Ray founded and operated a company, ZetX, for which he wrote a software program, TRAX (A 3967-71) that, according to the ZetX website, is able to map "complex phone records into simple, time-lapse, movie like presentations that anyone, from investigators and prosecutors to jurors, can easily understand." (http://zet x.com/ [last accessed, August 26, 2018].) According to the website "TRAX is the only mapping system of it's kind, and has been heralded as the superior cell phone mapping system for law enforcement" and is "*[t]he first and only company to dump the pie shape" to show cell tower coverage and handoffs using a different shaped area for its mapping* (http://zetx.com/ [last accessed, July 6, 2018] [italics added]).

Mr. Ray proceeded to review the text and cell phone records for Mr. Clayton and Mr. Beard's telephones from Verizon and AT&T, including the providers' cell tower location and cell site location information records, and the GPS data from the

Fleetmatic device of the vehicle Mr. Clayton used, and, Google combined with the results of the data he acquired by driving by the relevant locations with radio frequency scanning devices, Mr. Ray placed this information in a proprietary program, in part, in a script or program he wrote for this case and never used previously for Fleetmatic data (A 4150-51). Upon this analysis, Mr. Ray prepared mid-trial, two reports, a preliminary one (A 294-309), provided to counsel on the evening of January 17, 2017, more than a week after trial commenced (A 330-33), and a supplemental one (A 310-311) provided to counsel on January 25, 2017, more than two weeks after trial commenced.

As part of the first of these reports, Mr. Ray created three separate geo-location sub-reports purporting to map, with an alleged high degree of precision, locations of and movements of Mr. Beard and Mr. Clayton's telephones during the relevant times (A 308). In that first report, Mr. Ray also asserted that based on what he referred to as "call pattern analysis," that it did not appear that the Verizon device associated with Mr. Clayton's cell number was "being used by more than one person," that "sometimes call duration can reveal periods of stress," that "9/24/2015 stands out the most in reference to anomalies and patterns seen that are associated with stress, or an irregular pattern that is consistent with a notable event," and that call progression seen on 9/24/2015 "is indicative of signs of stress or notable behavior." (A 300-302,

307)

The first report expressly stated that the best practice to accurately determine phone locations is to conduct a "site survey" or "drive testing" of the area with scanning equipment providing more precise information about the cell sites in the location. (A 309).

The supplemental report, written after Mr. Ray conducted drive testing on January 19, 2017, stated that after reviewing the "call data records associated with the case, [Mr. Ray] felt a drive test was required to provide critical data to support [his] finding of the analysis." (A 310) This report then summarizes how the drive test conducted about 16 months after Kelley Clayton was killed is the basis of Mr. Ray's findings as to the signal and quality of the Verizon network in the Corning locations in issue (A 310-11).

C. Defense Counsel Filed a Specific and Timely Motion to Preclude Sy Ray's Testimony and For a *Frye* Hearing

When, mid-trial, trial counsel first learned of the expert testimony which the prosecutor sought to have Mr. Ray provide, trial counsel advised the court that a *Frye* hearing would be needed as to this testimony (A 1435-36). When, later in the trial, the prosecutor finally provided Mr. Clayton, with Mr. Ray's reports, Mr. Clayton filed a motion in limine (A 259-278) and a supporting memorandum (A 279-88), to preclude Mr. Ray's testimony or, as a threshold matter, a hearing, pursuant to *Frye*

v United States (293 F 1013[DC Cir 1923] and *People v Wesley* (83 NY2d 417 [1994]) for determination as to whether the proffered scientific evidence was admissible in that it is generally accepted in the relevant scientific or technological community and whether such accepted methods were appropriately applied in this case to establish a foundation for the reception of the evidence at Mr. Clayton's trial.

In his motion and memorandum, Mr. Clayton urged that Mr. Ray's testimony that the locations of the telephones and the call patterns made it possible to determine that the person making the calls was "stressed" was not based on procedures and techniques accepted by the relevant scientific community (A 259, 281-82). In an affidavit in support of the motion, Leslie T. Hyman, a retired New York State Police Investigator, with an extensive training and experience in forensic telephony, swore upon his review of the data, that "Mr. Ray's analysis and manipulation of available data is incomplete and misleading," and had not "reached a level of scientific reliability" necessary for admission (A 262) Mr. Hyman's affidavit, which stated that he had consulted on the case with Vladan Jovanovic, Ph.D. (in Electrical Engineering), who specializes in the field of digital radio communications and cellular technology (A 267), noted the myriad deficiencies with Mr. Ray's analysis and report. Among other cited problems with Mr. Ray's analysis and methodology, was:

(1) its reliance on Verizon's location estimates despite Verizon having explicitly disclaimed the accuracy of the latitude and longitude measurements, noting that they are not related to any GPS measurement (A 263; Trial Exhibit D28 included in the Record at 5811);

(2) its reliance on AT&T's location estimates despite AT&T having explicitly disclaimed the accuracy of the latitude and longitude measurements, urging "caution in using these records for investigative purposes as the location data is sourced from various databases which may cause location results to be less than exact" (A 264);

(3) some of the sequential location data reflected in Mr. Ray's findings were physically impossible for a telephone within the stated time periods (A 265, 317-18);

(4) the cell tower sector coverage that Mr. Ray illustrates is a simplistic and inaccurate description of the actual sector coverage of those towers (A 266);

(5) the use of the inherently unreliable data from the providers to plot locations in Mr. Ray's proprietary system has not been generally recognized as reliable within the technological community (A 263);

(6) conducting drive testing sixteen months after the relevant events without making test calls from the devices at issue, when the network, tower signal, and the ground conditions (such as foliage) have changed and the mobile/test setup is different than that of the phone used for the calls/texts is not an accepted source for determining historical information as to a cell network, and Mr. Ray's reports fail to account for such changes (A 264-265);

(7) Mr. Ray's assertion that he can determine that an individual is stressed by examining the pattern of the individual's telephone calls is a methodology lacking acceptance within the relevant scientific community. (A 263-267, 300-02, 307).

Additionally, in oral argument in support of this motion, counsel gave an example of how Mr. Ray's analysis and conclusions are misleading fiction as to the

locations during an early morning phone call on September 24, 2015 (a key date in the prosecutor's scenario of Mr. Beard and Mr. Clayton getting together, but not necessarily early morning). Trial counsel urged that the Google data does not show the phone near Ginnan Road, as Mr. Ray concluded, because Mr. Ray selectively chose for that call to use the AT&T tower information instead, to claim that Mr. Beard had to have been within 1.68 miles of Mr. Clayton's residence at the time of the call. Further, counsel noted that Mr. Ray based his analysis not on the data points provided, but on his drive test, which was conducted in January, 2017, sixteen months after the phone call, when the foliage, network and signal strength of the towers was different due to routine maintenance. (A 310-11, 3939-3940). Counsel explained that just like a photograph of a scene taken more than a year after the event would not be admitted absent proof of unchanged conditions, a drive test conducted so much later with changed conditions is not accepted as reliable within the field. Further, trial counsel explained that unlike programs such as Cellebrite, accepted as reliable, which merely records data points provided by the carriers, Mr. Ray's program which he wrote and then customized for this case has not been so accepted and his reports and exhibits were based not merely on data points, but on Mr. Ray's analysis and assumptions as to the locations of the phones not supported by the actual data from the carriers (A 3941). Further, counsel urged that Mr. Ray's basing his conclusion on

tower location rather than the full data provided by the carriers is also unreliable and not accepted and results in a misleading and inaccurate mis-characterization of the evidence (A 3941-42).

In his argument, counsel described how the late, mid-trial receipt of information about Mr. Ray and of Mr. Ray's report hindered defense efforts to analyze and refute it. After being cut off when trying to tell the court why Dr. Jovanovic, the defense expert hired after learning of Mr. Ray, was appalled by Mr. Ray's methods and findings (A 3943-45), counsel told the court that Dr. Jovanovic was in Seattle, but was available to testify at a *Frye* hearing via Skype to explain why Mr. Ray's methodology was junk science and not the appropriate way to map phone data (A 3948). Counsel then gave an example of one of the problems with Mr. Ray's report and conclusions, which Dr. Jovanovic would explain, Mr. Ray's graphics purported to show each tower sector as having equal strength and range, while, in fact, the sectors of a cell tower vary greatly as to range, which renders the resulting graphics both inaccurate and misleading as to the locations of phones (A 3948-50). The prosecutor responded to this argument by claiming that the findings from Mr. Ray's driving by places, supplemented and enhanced the accuracy of Mr. Ray's findings (A 3950-51). The prosecutor's memorandum in opposition to the motion for a *Frye* hearing, urged that Mr. Clayton's claims at to the accuracy of the location

measurements, variables not considered, and the failure to conduct drive tests at or near the time of the crime, all relate to weight of evidence which is not a proper topic for a *Frye* motion (A 290). Next, citing *People v Littlejohn* (112 Ad3d 67 [2d Dept 2013]), the prosecutor's memorandum asserted that Mr. Ray's deductions from the data of the network providers was not a "novel scientific technique" and *Frye* does not apply (A 291-297).

Thus, there was a stark factual dispute on the material point as to whether Mr. Ray simply recorded and reported the data supplied by the providers, or, as alleged in the submissions and arguments in support of the motion for a *Frye* hearing, manipulated and analyzed such data in a misleading manner lacking acceptance within the relevant scientific community and that the reliance on the non-contemporaneous drive tests is not accepted within the relevant scientific community as a reliable method for determining cell phone locations 16 months earlier. As such, the motion could not properly be denied without a hearing to resolve this factual dispute prior to deciding the legal issue of the admissibility of Mr. Ray's evidence (*People v Mendoza*, 82 NY2d 415, 426 [1993]; *People v Gruden*, 42 NY2d 214, 215 [1977]).

D. The Lower Court Erroneously Denied the Motion for a Frye Hearing

1. Introduction

Upon these submissions and arguments, the court first ruled that Mr. Ray could not testify on call pattern analysis (his claim that an analysis of frequency and time of calls reveals stress) (A 3953). Then, without ever hearing from Dr. Jovanovic as to why he believed the proffered evidence of Mr. Ray was based on flawed science and without resolving the factual dispute as to whether Mr. Ray had manipulated the data and had improperly relied on non-contemporaneous drive tests, the court denied a *Frye* hearing (A 3953). The court ruled that such evidence could be sufficiently challenged by cross-examination (A 3953).

2. Sy Ray's Testimony Confirmed the Lack of Scientific Basis of His Testimony and the Necessity of a *Frye* Hearing

As detailed below, Mr. Ray's testimony and the affidavit and report of Dr. Jovanovic submitted in support of a motion to set aside the verdict pursuant to CPL § 330.30, demonstrated that, if, as required, a hearing had been held, it would have been determined that Mr. Ray's testimony was inadmissible. This review of Mr. Ray's testimony and the content of Dr. Jovanovic's affidavit and report submitted with the 330.30 motion to show would have been established if a *Frye* hearing had been conducted, as requested, is consistent with the holdings of this Court and the Court of Appeals that in determining whether a court's pre-trial redaction of a co-defendant's statement had been sufficient or whether severance should have been ordered pretrial, an appellate court may engage in a retrospective review of the full

trial court record (*People v McGuire*, 148 AD3d 1578, 1579 [4th Dept 2017]; *People v Lewis*, 182 AD2d 1093, 1094 [4th Dept 1992]; *People v Mahboubian*, 74 NY2d 174, 184–85 [1989]; *People v Lopez*, 68 NY2d 683, 685 [1986]).

Mr. Ray proceeded to testify and provide visual exhibits to the jury based on his opinion evidence. This testimony was aimed at showing the location and movements of Mr. Clayton and Mr. Beard's phones at critical times suggested that they had gotten together (A 4001-46, 4078-88). After acknowledging that cell network provider data not based on GPS is not precise as to device location, and is just an estimate (A 3976-77, 4002) and that GPS based Google data is more accurate (A 3995-4002), Mr. Ray testified that by driving on January 19, 2017, from Mr. Beard's house to Mr. Clayton's house with an AT&T device (not Mr. Beard's), he was able to determine which towers were accessed in September, 2015, and was able to use that information to plot locations more precisely (A 4027-31). Mr. Ray then testified that he was able to determine that Mr. Beard and Mr. Clayton were in close proximity at 12:09 p.m. on September 26, 2015 (A 4039-40). Based on his analysis and drive test results, Mr. Ray proceeded to testify with relative precision as to the locations of Mr. Beard and Mr. Clayton on September 26, 2015 (A 4041-45).

Mr. Ray testified, and had animations played to the jury, to show, in part that cell tower sectors are "amoeba shaped" (A 3989) and how his driving by the area two

weeks earlier enabled him to determine which cell towers were accessed by Mr. Clayton and Mr. Beard's telephones 15 months earlier (A 4027-28). He conceded that due to possible changes in both the towers and the area, it is best to conduct drive testing on the day of the incident (A 4029).

Mr. Ray, relying on his January 19th scan results (A 4288-93), testified that his drive tests showed that there was good reception outside M & M Auto (A 4120-21). This testimony prejudiced Mr. Clayton because it undermined his claim that he asked to use the M & M phone (to call Mr. Beard) to make a call because he was not getting cell reception (A 1916). In contrast to Mr. Ray's testimony, the owners of M & M Auto both explained that, consistent with Mr. Clayton's claim, the reception had been very bad outside of M & M Auto in 2015 (A 4546). They further testified that Mr. Clayton, a frequent customer, had often used M & M Auto phone in 2015 (A 4556-57, 4648). They also testified, critically, that *after* September, 2015, Verizon made improvements to the cell coverage by adding a repeater about a mile from M & M Auto (A 4673-74). Indeed, Roland Duel, the prosecution witness who testified about Mr. Clayton's use of M & M Auto's phone that day, also testified as to how bad the cell reception was at M & M Auto (A 1916-17).

Thus, not only was Mr. Ray's testimony as to the cell coverage at M & M Auto misleading and inaccurate, it was shown to be inaccurate *because* Mr. Ray relied on

the data from his drive testing conducted 16 months after the critical events.

Mr. Ray acknowledged that when he conducted his scan during the drive tests in January, 2017, there were no leaves on the trees and, thus, different calling and cell tower coverage conditions, than existed in September, 2015, the period for the calls at issue (A 4303-04).

The changes in cell coverage at M & M Auto between September, 2015 and January, 2017, due to the post-September, 2015 placement of a repeater and the changes in foliage illustrate why, as urged in the *Frye* motion (A 264-65), it is not accepted in the scientific community that one can reliably make an analysis from a drive test conducted after so much time has elapsed since the calls in question. But the court had refused to conduct a *Frye* hearing and Mr. Ray testified that this untimely drive test formed a critical component of his analysis that the phones of Mr. Clayton and Mr. Beard had been near each other (A 4297-4302).

Raising additional concerns regarding the reliability of the scans from his January, 2017 drive test as a basis for determining Mr. Beard and Mr. Clayton's phone locations and cell tower usage in September, 2015, Mr. Ray acknowledged that he never examined the phones used by Mr. Clayton and Mr. Beard (A 4143-46). The technical characteristics of the phone, such as the wattage output and generation of the phone's broadband capability, may affect signal strength, impacting which

tower is accessed

(Call Detail–Cell Site, Independent Digital Forensic Laboratory [12/1/16], p. 7, http://digitalevidencetoolbox.com/Wordpress2/wp-content/uploads/2016/12/Toolbox/08-CALL%20DETAIL%20&%20CELL%20SITE/CALL%20DETAIL-CELL%20SITE%2012-01-16.pdf).

Further undermining the finding that Mr. Ray's program for determining phone location was sufficiently reliable that no *Frye* hearing was required, Mr. Ray testified that he wrote a new script or program which he used in this case which he had never used previously (A 4190-91).

During cross-examination of Mr. Ray, it was demonstated that Mr. Ray's chart showed Mr. Clayton and Mr. Beard at the same place near the Pennsylvania border at the same time on September 21, 2015, days before the killing of Kelley. Mr. Ray then acknowledged that, in fact Mr. Clayton's phone was elsewhere at that time (A 4161-64, 4194). This mistake was a consequence of a combination of Mr. Ray ignoring the network provider's stated limitations on the accuracy of their data, the inconsistency in the information provided by Google and Verizon, and Mr. Ray selectively (and incorrectly) determining which information to rely on for any calculation, to more precisely locate the phones than the providers state that their data allowed (A 4161-94).

On re-direct examination, Mr. Ray tried to justify his findings by explaining that since Google and Verizon had inconsistent data placing the same phone at different locations at the same time, he analyzed and interpreted the data to determine which location information to use. He determined that the Google data was not correct (A 4296-97). When Mr. Ray then explained how he needed to do the drive tests to be able to actually place phones in a specific place and that he used the scans from his drive test to conclude that the telephones were near each other, counsel objected to testimony based on the scans since conditions had changed during the intervening 16 months (A 4298-4302). The court overruled the objection, stating that the impact of the changed conditions goes to weight not admissibility (A 4302).

Because Mr. Clayton's counsel was not even informed of the existence of Mr. Ray until after trial commenced and did not receive his reports until mid-trial, the defense expert, Dr. Jovanovic, who lives in Seattle, Washington was unavailable to testify to the jury as to why Mr. Ray's testimony was based on unreliable assumptions and methodologies, not accepted within the scientific community, and why Mr. Ray's conclusions were not supported by the data (A 330-37, 351-60). Ultimately, Dr. Jovanovic detailed these issues in an affidavit and report which was filed in support of Mr. Clayton's motion to set aside the verdict (A 351-60).

3. Dr. Jovanovic's Affidavit and Report Detailed Why Mr. Ray's Methodology Is Not Accepted Within the Scientific Community

In that affidavit and supporting report, Dr. Jovanovic, a Ph.D. in electrical engineering, specializing in cell phone systems engineering, RF engineering, and geo-location, with more than 25 year of experience in these fields, detailed four major problems with Sy Ray's testimony as to call records and phone locations (A 351-52, 361-62).

First, he explained how the cellular provider information as to phone location is expressly stated as only being estimates, not developed in a manner to permit outside experts to accurately use this data to precisely plot locations. These location estimates are based on privately held, untested, algorithms. Thus, in *People v Oquendo*, Supreme Court Rensselaer County (10/26/17 unreported decision [attached hereto]), the court held, after a *Frye* hearing, at which the People presented testimony from both an FBI Special Agent and a records custodian from Google, that the People had failed to establish that Google's undisclosed algorithm and Google location services had gained acceptance in the scientific community and precluded that evidence from trial. As detailed in Dr. Jovanovic's affidavit and report, the actual plotting in this case of the cell providers' location estimates resulted in impossible locations and movements of the phones, such as having Mr. Beard's phone appear to traverse 25 miles within 10 seconds or moving from Montour Falls to Daytona Beach, Florida within 10 seconds. These examples merely highlight the unreliability of the

providers' estimations of location (A 354-55, 365-76). Indeed, as set forth in Dr. Jovanovic's report, AT&T, Verizon, and Google, all expressly provided disclaimers of the accuracy of their data described as "estimates". (A 376). The providers use these estimates for sales, marketing, and customer care purposes, but, in line with the providers' disclaimers the estimates are not intended for use in court.

Second, Dr. Jovanovic explained how Mr. Ray's "Trax" software artificially filled in gaps in the network providers' location estimates by assigning an "amoeba" shaped pattern for the antenna radius and extrapolating locations based on that pattern. But, he explained, this use of "amoeoba shapes" had "no basis in science or in any practice by RF engineering professionals in their work, even for the crudest of approximations" (A 355). There is no scientific support for Ray's claim that the cell coverage can be depicted even approximately as amoeba shaped and his use of that shape in determining phone locations. The phrase "amoeba shape" is never used in books or articles in the field as a description of the shape of cell coverage. Instead scientists have consistently explained that the pattern theoretically would be hexagonal in shape, but that in the real world, due to the variety of factors that can impact coverage, the shape is more irregular (see, G.L.Stuber, *Principles of Mobile Communications*, 4th Edition, Springer International Publishing [2017], p 14; A. Goldsmith, *Wireless Communications*, Cambridge Univ Press [2005], pp 505-507;

R.Steele, *Mobile Radio Communications*, 2d Edition, Wiley-IEEE press [1999], pp 52-53).

Dr. Jovanovic further explained how Mr. Ray's "Trax" software not only greatly overestimated coverage areas by the networks (by a factor of two or three), but, even worse, showed data that did not exist in the source files (such as specific antenna azimuth) where no such information was provided. Examples of Trax using the less accurate Verizon information when Google GPS information would have placed the phone 6 miles away from the location presented by Trax (A 356).

Third, Dr. Jovanovic's report detailed how Mr. Ray's approach was fundamentally misleading because of its failure to properly consider how best server coverage actually works and, as a consequence, produces demonstrably inaccurate results as to the location of devices (A 377-80). Most critically, the report documented how Mr. Ray's presentation was based, in part, on data that had been manipulated and not merely recorded, giving specific examples where the presentations showed information about the calls that was not provided in the call logs and had to have been *added* by Mr. Ray or the program (A 381-83). Similarly, Dr. Jovanovic's report documented how, in mapping powering events, Mr. Ray "took some liberties unfounded in science or engineering practices" by, for example "arbitrarily positioning" the location of powering events without support from the

data supplied by the providers by looking where the phone was prior to and after the events (A 384-88). As explained in the report, upon examining the location estimates unsupported by the data "excluding the possibility of a human manipulation error – it is kind of difficult to envision what kind of computer algorithm could make such a selection" (A 387-88).

The fourth significant problem with Mr. Ray's methodology was its reliance on faulty drive test RF scanning conducted in January 2017 to reach conclusions regarding calls made in September, 2015 (A 356-59, 389-96). Dr. Jovanovic's affidavit and report described how the differences in foliage in January, 2017 and September, 2015 could have impacted the scan results, how the drive test setup with different phones, antenna placements, vehicles, can impact the scan results, how the providers's networks varied between those two dates, with differences, such as different antenna gains, down-tilts, sector power settings. Such variances and changes were not reported by the providers (and, thus could not be known, by Mr. Ray) and could impact the test results, and how changes such as the addition or removal of repeaters, could seriously impact observed network coverage (A 357-58, 389-91).

Dr. Jovanovic's affidavit and report then described how Mr. Ray reached numerous misleading conclusions based on his drive test data, such as (1) placing Mr. Beard's phone on September, 24, 2015, at a location near Mr. Clayton's house,

instead of where the AT&T data placed the phone, (2) placing Mr. Beard's phone on the Red School Road area on September 21, 2015, supposedly based on the drive test detecting the so-called "Addison Tower" when, in fact, that tower was not reported in the drive test data, (3) at least one data point in the AT&T drive test appears to have been manually altered, as the point shown on Mr. Ray's map does not appear in the data, (4) the data showed no testing closer than .5 miles to M & M Auto, (5) the drive test failed to account for the new repeater installed near M & M Auto, and (6) the number of Verizon repeaters installed in the area suggest coverage problems in the area (A 358-59, 391-96).

After detailing all of these problems with both the data relied on and the methodolgy employed, Dr. Jovanovic concluded that Mr. Ray's reliance on source data without accuracy guarantees rendered impossible testing and verification by outside experts, in violation of generally accepted scientific principles. Then Dr. Jovanovic concluded that Mr. Ray's

> misleading extension and manipulation of such inherently unreliable and unverifiable data in such manner as to make the resulting visual product appears accurate and grounded in sound data. To the contrary, the presentation appears to show conclusions that are not supported in raw data and in some instances represent manual alterations of the data. This contravenes basic principles of scientific inquiry, repeatability, reliability and integrity.

(R 372).

Thus, Dr. Jovanovic's affidavit and report, which constituted a detailed version of what he would have testified to had the court not denied the requested *Frye* hearing, established that, as urged in the motion for the hearing, Mr. Ray's methodology was not based on scientific principles or procedures with general acceptance in the relevant scientific field.

Because the court refused to hold a *Frye* hearing, Dr. Jovanovic's demonstration of the lack of scientifically accepted basis for Mr. Ray's testimony and exhibits was never considered by the court. Instead, Mr. Ray's unreliable and highly prejudicial testimony, accurately described by the prosecutor as the "crux" of his case (A 3945), was admitted without conducting the required *Frye* hearing. In doing so, the court blindly accepted Mr. Ray's provably false contention that he engaged in no data manipulation and that he merely plotted data points. In reality, Mr. Ray's artificial enhancement of the precision in which cell phones can be located is the very type of testimony which had been held to be improper, since it lacks acceptance withing the scientific community. Phrased differently, Mr. Ray's professed ability to precisely plot locations of cell phones is no more reliable or accepted by scientists than his professed ability to detect "stress" from the pattern and timing of phone calls. Given the specific allegations made in the motion for a *Frye* hearing, the refusal to conduct such a hearing was, at a minimum, an abuse of discretion.

If a *Frye* hearing had been held, as required upon the allegations in the motion *in limine,* the court would have concluded that Mr. Ray's testimony was not admissible because his methodology was not accepted within the scientific community to permit his testimony *interpreting* the historical cell phone records and location data for the jury. Further, the analysis by Mr. Ray depended on historical information and later experiments (the drive test scanning) conducted 16 months after the data in question, such that they did not provide a reliable basis, accepted by the relevant scientific community, for Mr. Ray's retrospective conclusions about cell phone locations.

4. Cell Phone Technology and the Limitations on the Precision of Estimates of Phone Locations

A basic understanding of how cell phone technology works and the limits of the information collected by cell phone providers as to phone location is needed to fully appreciate why Mr. Ray's testimony would not have been found to have passed the *Frye* test if a hearing had been held.

Cellular technology relies on radio waves to carry transmissions between a cell phone and a cell site, also known as a cell tower. Each tower typically has three antennae, each responsible for covering a 120–degree wedge. A cell site "sector" refers to the area contained within a (usually) hexagonal array of cell towers. A cell phone generates "historical" cell-site data when it places a call and connects to a

specific cell tower. Such data includes the particular cell-tower antenna to which the cell phone connected and the duration of the call. The "one-location" tracking approach assumes that the cell phone connected to the closest tower because that tower is most likely to produce the strongest signal. As most cell towers have three antennae facing different directions, the data generally indicate the direction of the caller relative to that tower—i.e., the 120–degree wedge serviced by the antenna—and thereby estimate the cell-site sector from which the call originated. Critically, cell phones are designed to connect to the tower with the strongest signal, which might not actually be the closest because factors such as signal strength, impacted by factors such as weather, and obstructions, the height, number, and direction of antennas, and network traffic can cause a call to connect to a tower farther away (Dumm, *The Admissibility of Cell Site Location Information in Washington Courts*, 36 Seattle U Law Review 1473, 1477-82 [2013]; Michael Cherry *et al*, *Cell Tower Junk Science*, 95 Judicature 151 [2012]; Matthew Tart, *et al*, *Historical Cell Site Analysis – Overview of Principles and Survey Methodologies,* 8 Digital Investigations 185-93 [2012]; *United States v Reynolds*, 626 Fed.Appx. 610, 614–15 [6th Cir 2015]). Furthermore, the rate of attenuation will vary with the type of material between a phone and a tower. Consequently, different cell towers may be selected from the front or back of a property due to different sightlines and the service

area of a cell tower covering a "forest may change with the season, as leaves can also attenuate signals." (Matthew Tart, *et al*, *Historical Cell Site Analysis – Overview of Principles and Survey Methodologies*, at 187). Once the call reaches a tower, the interaction is recorded by the network provider. The call then proceeds to a mobile switching center, which may choose to reroute the call to a different tower based on network traffic. The call may also be rerouted to a different tower if the caller changes location during the duration of the call (*United States v Evans*, 892 F Supp2d 949, 953 [ND Ill 2012]).

When a cell phone sends or receives a communication, the cellular provider automatically records a data set corresponding to each call or text message for billing purposes. Most standard call detail records show the time of the call, the duration of the call, the location of the tower from which the call was sent or received, and the specific "face" (which of the three directional vectors) of the tower from which the call was sent or received (Dumm, *The Admissibility of Cell Site Location Information in Washington Courts*, 36 Seattle U Law Review at 1480).

The providers also provide their estimates of a phone's locations based on the providers's calculations regarding the towers and the timing of call signal detection. These location estimates from cell providers are not based on GPS information. (A 353-64) Consequently, the providers make clear that the location information they

provide are estimates, accurate only to very large distances. For example, as reproduced in Dr. Jovanovic's report the location estimates provided by AT&T in this case, state location accuracies for calls varying from 5000 meters to 10,000 meters (which is 3.1 to 6.2 miles) (A 358). Further, as also reproduced in Dr. Jovanovic's report, Verizon, AT&T and Google all set forth accuracy disclaimers as to their location estimates warning users that these are merely "the best estimates rather than the precise location " (Verizon), that it "reflects an estimated uncertainty value regarding the reported coordinate" (Google), and that one should "exercise caution in using these records for investigative purposes as location data is sourced from various databases which may cause location results to be less than exact" (AT&T) (A 364).

There are important consequences which flow from the providers' admittedly inexact and general data point estimates of cell phone locations. First, as noted above, at least one court has held that this location data has not been established as accepted within the relevant scientific community (*People v Oquendo*, Supreme Court Rensselaer County [10/26/17 [unreported decision] [attached hereto]). Second, courts consistently have held that the mere plotting on a map of the coordinates of cell tower locations and antenna orientations (not of the location estimates of the phone), from phone records is a routine procedure or technique, and the *Frye* standard is not

applicable (e.g., *People v Wilson*, 86 NE3d 1231, 1243 [Ill App 2017]; *Stevenson v State*, 112 A3d 959, 967–68 [Md App 2015]; *State v Patton*, 419 SW3d 125, 129–30 [Mo Ct App 2013]). Third, courts have held that testimony about the general, but not specific, location of a cell phone based on cell provider location estimates is proper and admissible (e.g., *United States v Lewisbey*, 843 F3d 653, 659 [7th Cir 2016], quoting *United States v Jones*, 918 F Supp2d 1, 5 [D DC 2013] ["the use of cell phone location records to determine the general location of a cell phone has been widely accepted by numerous federal courts"]; *United States v Pembrook*, 119 F.Supp.3d 577, 597 [ED Mich 2015] [same]; *Stevenson v State*, 112 A3d 959, 968 [same]).

Thus, for example in *People v Littlejohn* (112 AD2d 67 [2d Dept 2013]), the case relied on by the prosecutor for the proposition that no *Frye* hearing was required regarding Mr Ray's testimony (A 291-92), the District Attorney's brief repeatedly emphasized that the court had been told that the witness would only testify about "approximate location" based on the cell towers accessed and that the testimony was to the "approximate location" of the phone based on T-Mobile records (*People v Littlejohn*, 112 AD2d 67, Respondent's Brief 7-14). Similarly, numerous other cases, in permitting an expert to testify about cell phone locations based on historic CSLI have noted that the expert would be testifying only as to general and not specific

locations (*People v Fountain*, 63 NE3d 1107, 1127 [Ill App 2016]; *United States v Howard*, 2017 WL 2662469, at 3-4 [Central Dist Calif 2017]; *United States v Reynolds*, 2013 WL 2480684, at 5 [ED MI 2013], affd 626 Fed Appx. 610, 616–17 [6th Cir 2015]).

By contrast, Mr. Ray claimed to provide a much more precise location of cell phones than the providers' data supported by using analysis techniques aimed at enhancing the professed precision of this data, based on assumptions such as the shape/size of tower coverage area, the likelihood that the phone was in the area of the accessed tower courts, and/or non-contemporaneous drive tests. Courts have rejected such testimony (*United States v Evans*, 892, F Supp2d 949 [ND Ill 2012]; *Phillips v State*, 163 A3d 230, 233–34 [MD App 2017], affd 2018 WL 947700 [2/20/2018]).

In *Evans*, *supra*, the Court rejected the proffered testimony of FBI Special Agent Raschke purporting to estimate the location of defendant Evans's phone. In his effort to determine where the phone was located Special Agent Raschke first identified (1) the physical location of the cell sites used by the phone during the relevant time period; (2) the specific antenna used at each cell site; and (3) the direction of the antenna's coverage. He then estimated the range of each antenna's coverage based on the proximity of the tower to other towers in the area. Based on that information, using his training and experience, Special Agent Raschke claimed

he could predict where the coverage area of one tower will overlap with the coverage area of another (*Id.*, at 952). Based on his calculation of the coverage area of the cell towers accessed by Mr. Evan's phone during calls, Agent Raschke claimed that Mr. Evans could have been at the area from which the victim was held for ransom. The prosecutor also sought to introduce maps showing the towers Mr. Evans's phone used including a drawing of Agent Raschke's estimated coverage overlap of the two tower (*Id.*, at 953).

In deciding on the admissibility of this evidence, the court first held that it was permissible to introduce an exhibit which merely plotted the cell tower locations accessed by Mr. Evans's phone. Then, noting that the relevancy of that information is based on the premise that cell phones connect to the tower in its network with the strongest signal, and the tower with the strongest signal is *usually* the one closest to the cell phone at the time the call is placed. However, as noted above, a number of topological and network factors may result in a phone connecting to a more distant tower (*Id.* at 953-54).

Most importantly, the Court refused to admit the proffered testimony of Special Agent Raschke, premised on a theory and analysis technique employed by the FBI, that he was able to estimate the range of certain cell sites based on a tower's location relative to other towers. Allegedly, this estimated range, in turn, allowed him to

predict the coverage overlap of two closely positioned towers and narrow down the likely location of the phone. Despite the fact that Special Agent Raschke testified that he and other FBI agents has used this theory numerous times in the field to locate individuals in other cases with a zero percent rate of error, the court was not persuaded that this theory had been shown to be reliable and accepted within the relevant scientific community. First, the Court held that such a theory overestimated the likelihood that phones connect to the nearest tower. Second, the basis for the calculation of signal strength and effective range of each tower was insufficient. The Court concluded that the FBI's theory for determining location based on its assessment of signal strength and likely area within which towers hand off calls remains wholly untested by the scientific community." (Id. at 955-56).

In *People v Garlinger* (203 Cal Rptr3d 171, 181–82 [Cal App 3d Dist 2016]), the court permitted the admission of testimony as to which cell towers had been accessed, which sectors of those towers had received the defendant's calls, and the direction of that sector's coverage in order to reach a deduction of the general area in which a phone had been, because, it held, that unlike in *Evans*, the witness did not purport to "have estimated the coverage area of towers based on their proximity to other towers" and did not "claim to have determined the location of defendant's cell phone based on his ability to predict overlapping coverage areas." The court noted

that those were the aspects of the proffered testimony in *Evans* found to be lacking in reliability.

Significantly, Mr. Ray's testimony as to how he calculated the coverage areas of towers was like that in *Evans* and not limited like that in *Garlinger*.

As in *Evans*, the fact that Mr. Ray has used his technique previously does not render it admissible under the *Frye* test. As the United States Court of Appeals for the Sixth Circuit has explained in critiquing other courts' conclusion that using historical cell-site tracking analysis to determine a person's past whereabouts was reliable on the basis of testimony that the technique had been tested and accepted by the law-enforcement community and its successful use by the FBI at least 1000 times in locating suspects

> This claim appears to be precisely the sort of "ipse dixit of the expert" testimony that should raise a gatekeeper's suspicion. While being successfully employed "1000 times" may sound impressive, the claim is not subject to independent peer review and fails to establish an error rate with which to assess reliability because there was no information on how many times the technique was employed unsuccessfully.

(*United States v Reynolds*, 626 Fed Appx 610, 616–17 [6th Cir 2015].)

The problems that may arise from accepting claimed expertise not subject to peer review are perhaps best illustrated by the FBI's experience touting its ability to link a bullet used in a crime to those possessed by a suspect employing a technique of comparative bullet lead analysis, premised on the proposition that each batch of

lead has unique chemical composition and that the FBI determination that there was a chemical match between bullets was significant in terms of the origin of the bullets. The FBI performed this type of testing in over 2500 cases before a study by the National Acadamy of Sciences determined that the premises of the analysis were faulty and the results unreliable, causing the FBI to discontinue the use of this test which may have led to wrongful convictions (Giannelli, Paul C., *Comparative Bullet Lead Analysis: A Retrospective* [2010], Faculty Publications, Case Western Reserve School of Law [http://scholarlycommons.law.case.edu/faculty_publications/97; https://en.wikipedia.org/wiki/Comparative_bullet-lead_analysis).

Similarly, in 2016 the President's Council of Advisors on Science and Technology concluded that forensic bite-mark evidence presented in thousands of cases was not scientifically valid (Report to the President, Forensic Science in Criminal Courts: [2016] https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf)

Indeed, misapplication of forensic science is the second most common contributing factor to wrongful convictions, found in nearly half (45%) of DNA exoneration cases. Among the types of problems with the misapplication of forensic are the admission of evidence produced by unreliable or invalid forensic discipline

and methods which cannot consistently produce accurate results and/or is the product of a method which had not been sufficiently validated (https://www.innocenceproject.org/causes/misapplication-forensic-science/; see also, New York State Bar Association's Task Force on Wrongful Conviction, Final Report of the Forensic Evidence Subcommittee, 90-104 [2009] [detailing New York wrongful convictions caused by the admission of unreliable forensic evidence] [https://www.nysba.org/wcreport/]).

5. Non-Contemporaneous Drive Tests Have Not Been Accepted Within the Scientific Community for the Purposes of Determining the Location of Phones Based on Historical CSLI

Mr. Ray apparently recognized these problems and shortcoming with his methodologies since he wrote in his Supplemental Report that after reviewing the "call data records associated with the case, [Mr. Ray] felt a drive test was required to provide critical data to support [his] finding of the analysis." (A 310) Consequently, Mr. Ray conducted drive scans on January 19, 2017, 10 days after the trial commenced, in an effort to determine where the phones would likely have been located when accessing certain towers in September, 2015.

In his Supplemental Report based on his drive test scan results, Mr. Ray misleadingly wrote that such "methods are regularly utilized in the normal course of business by cellular provider for network planning and diagnostics." (A 310). But

while *contemporaneous* drive test scans are used to determine how a network is currently operating on the date and time of the test, non-contemporaneous drive tests have *not* been accepted within the scientific community for the purposes of determining the location of phones because of inability to control for changed conditions (*Phillips v State*, 163 A3d 230, 233–34 [MD App 2017] [reinstating the holding of the trial court decision]; *United States v Cervantes*, 2015 WL 5569276, at *3 [ND Cal 2015]).

In *Phillips*, after conducting a *Frye* hearing, the court excluded the results of drive tests conducted 10 months after the calls in question, concluding that the prosecutor did not establish that non-contemporaneous drive tests, as used by the FBI to plot cell tower ranges and phone locations for calls made months earlier, are generally accepted in the digital forensic science community. The court noted that the prosecutor was unable to produce studies or peer-reviewed articles in that field supporting the reliability or general acceptance of such drive tests for forensic purposes (*Phillips v State*, 163 A3d 230, 233–34).

At the *Frye* hearing in *Phillips*, it was undisputed cell phone companies use drive test scans to improve coverage and minimize "dropped calls." The defense expert testified, as Dr. Jovanovic wrote in his affidavit and report, that because of a variety of changes in conditions over time, including RF signal strength changes,

non-contemporaneous drive tests scans are an unreliable basis to form conclusions as to cell tower coverage on an earlier date. The defense expert in *Phillips* also pointed out that drive tests for historical purposes have not been peer reviewed or accepted by the scientific community. The prosecution's two experts sought to minimize the impact that change over time in the network, the topography, and weather, would have on signal strength, but cited no studies to support their contentions (*Id.*). On this evidence, the court precluded testimony and maps based on the drive tests conducted 10 months after the calls in question.

Similarly, in *United States v Cervantes* (2015 WL 5569276, at *3 [ND Cal 2015]), a federal district court considering a challenge to the admission of drive test evidence where the tests were conducted 11 months after the calls in questions on different phones, found that

> the delay between the time of the events in question and the field experiments conducted by the FBI CAST agents is significant, and the government has not explained adequately whether there were any differences in the cell phone or antenna characteristics, reception and wave propagation in its field test conditions as compared to those relevant to the facts here. Absent some additional foundation establishing that [the FBI expert] accounted for these possible differences and had a reasonable basis for concluding that they were not significant, the government's assurance that [the FBI expert] "would not have conducted" the field experiment if he did not believe it to be reliable is not a sufficient basis for the Court to so conclude.

(*Id.*)

In *Cervantes*, the prosecution urged, just as Mr. Ray asserted, that their expert had used the drive test to map the actual radio frequency within particular cell tower sectors and that he had analyzed the towers and antennas to determine if any had been replaced or adjusted in the intervening period (*Id.*). The court held these assertions insufficient to establish admissibility.

The fact that a methodology for measuring or testing something, such as cell tower signal strength, might be reliable and accepted under certain conditions and for certain purposes, does not render it reliable or accepted for use under different conditions and for a different purpose. The methodology-only contention of the People, that since drive test scans conducted by cell phone providers can reliably measure how the network performs on the day of the test means that it can also reliably measure how the network performed 16 months earlier, circumvents the rationale for the *Frye* doctrine and resulted in the acceptance of unreliable and unaccepted expert opinion evidence.

As the Appellate Division, First Department held, to accept this

> "methodology-only, ignore-the-conclusion" approach would circumvent the rationale for the *Frye* doctrine. As defendants correctly contend on the basis of this Court's precedent, it is plaintiff's burden to show that his or her expert's theory is generally accepted in the relevant community (*Lara v New York City Health & Hosp. Corp.*, 305 AD2d 106 [2003]; *see also Styles v General Motors Corp.*, 20 AD3d 338, 342 [2005] [Catterson, J., concurring] ["(t)he *Frye* 'general acceptance' test is intended to 'protect juries from being misled by expert opinions that may be couched in formidable scientific terminology

but that are based on fanciful theories' " (citation omitted)]).

(*Marso v Novak*, 42 AD3d 377, 378-379 [1st Dept 2007]). *See, Styles v General Motors Corp.*, 20 AD3d 338, 342 [2005] [novel use of combination of two accepted automobile roof stress tests subject to *Frye* hearing to determine admissibility]).

There is no accepted basis for assuming that the results of drive test scan would be the same if testing were conducted on the date of a call soon thereafter. No study supports such a contention. Absent proof that the exact same conditions within the network and topography are present at the time of the drive test as at the date and time of the phone calls, these test scans are unreliable.

E. Conclusion

Mr. Clayton's motion for a *Frye* hearing, and supporting papers and arguments, correctly urged that Mr. Ray's analysis and manipulation of available data was incomplete and misleading, that it has not "reached a level of scientific reliability." Perhaps most importantly, Mr. Ray's program did not merely record and report the providers' data points, but reported locations *based* on Ray's analysis and assumptions not supported by the actual data from the carriers (A 3937-41, 3948-59). Nothing more needed to be or could have been alleged to show the need for a *Frye* hearing. The prosecutor responded to this argument by claiming that the findings from Mr. Ray's driving by places, supplemented and enhanced the accuracy of Mr.

Ray's findings (A 3950-51). Despite, the express challenge to the reliability and acceptance within the scientific community to Mr. Ray's reliance on the non-contemporaneous drive testing, the Court admitted this evidence without a *Frye* hearing.

If a *Frye* hearing had been held as requested regarding the unreliable and unaccepted methodologies employed by Mr. Ray, the court after hearing this evidence would have concluded that Mr. Ray's testimony was inadmissible because his methodology was not accepted within the scientific community as sufficiently reliable to permit his testimony *interpreting* the historical cell phone records and location data for the jury and because the analysis by Mr. Ray depends on historical information and later experiments (the drive test scanning) conducted 16 months after the date in question, such that they do not provide a reliable basis, accepted by the relevant scientific community, for Mr. Ray's retrospective conclusions about cell phone locations.

Mere map plotting of the information from the cell providers would not have produced the evidence which the People needed to bolster their case. The goal was to try to place Mr. Clayton and Mr. Beard together at key times. Achieving that goal required manipulation of the information in the providers's data points. Mr. Ray's mid-trial analysis was aimed at producing more specific location information than the

providers stated could be supported by their data. In part, Mr. Ray needed and relied on mid-trial drive testing scans to gather information he would use to form opinions as to which cell towers would be selected from particular locations. With Mr. Ray's testimony the prosecutor was able to argue at length in summation how Ray was a credible and knowledgeable witness and how his testimony placed Mr. Clayton and Beard together at critical times suggesting, without evidence, that they met and planned the murder of Kelley Clayton (A 4910-17).

For all of the reasons set forth above the admission of this prejudicial, testimony without conducting the requested *Frye* hearing deprived Mr. Clayton of his constitutional right to a fair trial.

POINT IV: THE COURT ERRED IN RULING THAT DR. JOVANOVIC'S AFFIDAVIT AND REPORT DETAILING HOW MR. RAY'S TESTIMONY WAS BASED ON A MISLEADING EXTENSION AND MANIPULATION OF DATA WAS NOT NEWLY DISCOVERED EVIDENCE

A. Introduction

CPL § 330.30 (3) authorizes a court to grant a motion to set aside the verdict on the ground "[t]hat new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant." As detailed below, the denial, without a hearing, of Mr. Clayton's motion pursuant to CPL § 330.30 (3) was reversible error.

Mr. Clayton's motion to set aside the guilty verdict was based in large part on the affidavit and report of Dr. Vladan Jovanovic. In these documents, Dr. Jovanovic details the numerous reasons that Sy Ray's reports and analysis were based on unreliable and unverifiable data, presented in a deliberately misleading and manipulative manner. Ray's findings were also based on testing which was systemically unreliable and riddled with inconsistences and faulty assumptions. This combination produced testimony and visual exhibits which misleadingly appear to be

grounded in sound science, but, in fact, were not supported in raw data and in some instances represent manual alterations of the data (A 380, 392-93).

Dr. Jovanovic described and detailed four major problems with Sy Ray's testimony recording call records and phone locations (A 351-60, 363-98).

First, Dr. Jovanovic explained how the cellular provider information as to phone location is expressly stated as only being estimates that have not been developed in a manner to permit outside experts to accurately use this data to precisely plot locations, the providers of all disclaimed the accuracy of this data, and the actual plotting of the providers' location data (which is different than cell tower information) result in impossible locations and movements of the phones, such as having Mr. Beard's phone appear to traverse 25 miles within 10 seconds or moving from Montour Falls, New York to Daytona Beach, Florida within 10 seconds. (A 376).

Second, Dr. Jovanovic explained how Mr. Ray's "Trax" software artificially fills in gaps in the network providers's location estimates by assigning an "amoeba shaped" pattern for the antenna radius and extrapolating locations based on that pattern. He further explained that this use of "amoeba shapes" has "no basis in science or in any practice by RF engineering professionals in their work, even for the crudest of approximations." (A 355).

Dr. Jovanovic also explained how Mr. Ray's "Trax" software not only greatly overestimated coverage areas by the phone networks (by a factor of two or three), but, even worse showed data that did not exist in the source files (such as specific antenna azimuth where no such information was provided), and examples of Trax using the less accurate Verizon information when Google GPS information would have placed the phone 6 miles away from the location presented by Trax (A 356).

Third, Dr. Jovanovic's report documents how, contrary to both the District Attorney's assertions in his memorandum in opposition to the *Frye* motion and Mr. Ray's assertions while testifying (A 4294), the presentation which Mr. Ray made to the jury was based, in part, on data that had been manipulated and not merely recorded, giving specific examples where the presentation showed information about the calls that was not provided in the call logs and had to have been added by Mr. Ray or the program (A 381-83).

The fourth significant problem with Mr. Ray's methodology, was it reliance on faulty drive test RF scanning conducted in January, 2017 to reach conclusions regarding calls made in September, 2015 (A 356-359, 379-88). The affidavit and the report first describe how the differences in foliage, the networks, and devices in January, 2017 and September, 2015 could have impacted the scan results, could impact the test results, and how changes to the networks, which are not reported, such

as the addition or removal of repeaters, could seriously impact observed network coverage (A 357-58, 379-81). Consequently, Mr. Ray reached numerous misleading conclusions based on his drive test data, such as (1) placing Mr. Beard's phone on September, 24, 2015, at a location near Mr. Clayton's house, instead of where the AT&T data placed the phone, (2) placing Mr. Beard's phone on the Red School Road area on September 21, 2015, supposedly based on the drive test detecting the so-called "Addison Tower" when, in fact, that tower was not reported in the drive test data, (3) at least one data point in the AT&T drive test appears to have been manually altered, as the point shown of Mr. Ray's map does not appear in the data, (4) the data shows no testing closer than .5 miles to M & M Auto, (5) the drive test failed to account for the new repeater installed near M & M Auto, and (6) the number of Verizon repeaters installed in the area suggest coverage problems in the area (A 358-59, 381-86).

Counsel's affirmation in support of the motion sets forth in detail how, despite repeated requests to the prosecutor and protests by counsel, the prosecutor only provided scant information about Mr. Ray and his analysis, and did so sporadically during the trial. Because of the prosecutor's mid-trial disclosure to the defense of information about Mr. Ray and of Mr. Ray's reports, Dr. Jovanovic, based in Seattle, was not available to testify at trial on such short notice (A 354-59). Counsel's

affirmation that Dr. Jovanovic was not available to testify at trial regarding Mr. Ray's analysis on such short notice reiterated an argument he made during trial that the court should preclude Mr. Ray's testimony because the defense had been "blind-sided" and had not been "given adequate time to hire a defense expert to respond..." (A 3962-65). Counsel's affirmation further explained that as a consequence of this "late disclosure and production of underlying materials, information, and work product of Sy Ray during and even near end of trial, Dr. Jovanovic's analysis thereof could not have been discovered earlier by the exercise of due diligence." (A 336-37), Finally, counsel urged that this newly discovered evidence was of such a character as to create a probability that has it been received as trial the verdict would have been more favorable to Mr. Clayton (A 340).

In an affidavit in opposition to the granting of the motion, the prosecutor urged that Dr. Jovanovic's affidavit and report were not newly discovered, because the information could have been presented with due diligence at trial , arguing that defense counsel had never sought an adjournment to have Dr. Jovanovic to testify at trial (A 336). Additionally, the prosecutor's affidavit contended that this information was merely impeachment evidence as to which it cannot be shown in the testimony of Dr. Jovanovic would have created the probability of a more favorable verdict to Mr. Clayton (A 336-37).

The court below, without a hearing, denied this branch of the motion, finding (1) that the evidence of Dr. Jovanovic's affidavit and report was evidence which could have been discovered during trial, (2) that, unlike Mr. Ray's testimony, Dr. Jovanovic had not been subject to cross-examination, and (3) this was merely impeachment evidence (A 5043-44).

But, because the prosecutor only disclosed to defense counsel mid-trial information about Mr. Ray, the data he relied on, and his methodologies and reports, the defense was unable to present to the jury a witness to testify as to how Mr. Ray's methodologies were unreliable, how Mr. Ray reached findings not supported by the data, and how his methodologies produced impossible and unreliable results (A 328-40). Consequently, the information in Dr. Jovanovic's affidavit and report constituted critical newly discovered evidence which revealed that Mr. Rays' evidence, the crux of the People's case, was as unreliable as Mr. Ray's assertion, set forth in the same report as his geo-location findings, that he could determine a person's stress level by the timing and frequency of one's calls (A 3287). Thus, as detailed below, the trial court's denial of the motion to set aside the verdict, without a hearing, was error which compounded the prior error of admitting Mr. Ray's evidence without a *Frye* hearing.

B. Given the Mid-Trial Disclosure of Mr. Ray's Analysis and the Methodology and Data Relied On, Dr. Jovanovic's Affidavit and Report Constituted Newly Discovered Evidence Which Could Not Have Been Produced by Mr. Clayton at the Trial Even with Due Diligence on His Part

CPL § 330.30 (3) authorizes a court to grant a motion to set aside the verdict on the ground "[t]hat new evidence has been discovered since the trial which could not have been produced by the defendant at trial even with due diligence on his part." Thus, the question becomes whether defendant could have discovered the material earlier in the exercise of reasonable diligence *(People v Madison*, 106 AD3d 1490, 1493 [4th Dept 2013]). "[T]he due diligence requirement is measured against the defendant's available resources and the practicalities of the particular situation" *(People v Tankleff*, 49 AD3d 160, 180 [2d Dept 2007] [internal citations omitted]). Measured by the practicalities of the situation in Mr. Clayton's case in which (1) Mr. Clayton and his counsel only received the requisite information about Mr. Ray and his analysis, methodologies, and underlying data from two to four weeks after the January 9, 2017, commencement of trial, (2) counsel had explained that his expert needed considerable time to review Mr. Ray's findings in the context of this data to determine how Mr. Ray had reached findings not supported by the data, and (3) counsel stated during trial and in his affirmation in support of the CPL 330 motion that, because of the midtrial disclosure of the information he did not have an expert

available to testify at trial to refute Mr. Ray's unreliable and inaccurate testimony, Dr. Jovanovic's affidavit and report could not have been discovered during trial with due diligence.

As detailed in paragraph 1-27 of the counsel's affirmation in support of the 330 motion and reiterated during oral argument of the motion (A 328-39, 5031-43), counsel had no information about Mr. Ray's existence until his name, without identifying information, was among the 98 persons listed as possible witnesses, and the information as to Mr. Ray, his findings, methodologies, and the data relied on were only provided to counsel in dribs and drabs to counsel from January 11 to February 9, 2017, while the murder trial was in progress (A 328-35, 5031-33). Counsel explained how it took Dr. Jovanovic two months of lengthy and tedious analysis to be able to show how Mr. Ray had taken limited data and extrapolated from it to reach unsupported conclusions (A 5033).

That it would take two months of tedious work to understand and how Mr. Ray reached his findings in an effort to document why they were neither reliable nor accurate is evidenced by the content of Dr. Jovanovic's report. To prepare that report, he had to first independently input all of the data and then review the information regarding the 60,000 data points to determine if and when Mr. Ray's findings were either inconsistent with and/or the product of an improper manipulation of or

extrapolation from the data. Also, without being privy to the algorithms used by Mr. Ray's Trax program, Dr. Jovanovic was required to spend many hours examining the data to try to determine the means by which Mr. Ray reached the conclusions that he did and if those methodologies were reliable.

To appreciate how much time it reasonable took Dr. Jovanovic, consider that Mr. Ray was retained in late December 2016, was able to drop what he was doing, devote himself to this case, travel to New York to do testing and was still unable to produce his two reports until January 17 and January 25, 2017, a full month later. Mr. Ray testified it took him only 5 minutes to input the 60,000 data points (A 4293). But it took him nearly a month after he was retained to interpret and analyze the data to develop his findings and projections as to locations.

Not surprisingly, when the final data needed by Dr. Jovanovic was not provided to counsel until February 9, 2017, Dr. Jovanovic, was not able to conduct and complete his examination of the data, reports, and exhibits until after the trial was over. Even if Dr. Jovanovic had time during trial to testify he was not in a position to do so until he completed his review of the data and Mr. Ray's reports and exhibits. Presenting an unprepared expert would have been even worse than not presenting any expert. Thus, as a consequence of the mid-trial disclosure of the information about Mr. Ray and his analysis, counsel had sought preclusion of Mr. Ray's testimony

because of his inability to call a defense expert at trial (A 3961-63). That is why, in support of the 330 motion, counsel affirmed and orally told the court that Dr. Jovanovic was not available to testify during the trial on such short notice (A 331-38, 5034-40).

In response, the District Attorney made a series of misleading and disingenuous arguments. First, he contended that because counsel, who, pre-trial, was unaware of Mr. Ray's existence, let along the nature of his analysis, had *some* of the phone company data pre-trial, he should have been prepared with an expert ready to respond to Mr. Ray. Next, the prosecutor noted that by January 11, 2017, the third day of trial, counsel knew that Mr. Ray was using a mapping program he designed to attempt to provide geo-location information for both Mr. Clayton and Mr. Beard (A 5030-40). Of course, Mr. Ray had not even written his first report yet and defense counsel had no information as to as how Mr. Ray's program worked or the bases of Mr. Ray's conclusions.

The prosecutor then urged because by February 8, 2017 (four weeks after the trial began and three weeks before the trial ended), defense counsel's experts had provided counsel with enough information to make the motion for *Frye* somehow meant that counsel was not credible when counsel asserted (both at trial and in his affirmation) that because of the belated disclosure, Mr. Clayton did not have an

expert available to testify at trial as to all of the problems with Mr. Ray's methodologies and findings (A 5040). Any reader of Dr. Jovanovic's report can easily see the difference between the depth of facts and analysis in the report and the arguments made in support of the *Frye* motion.

Next, the prosecutor argued that because counsel had made no mention of Dr. Jovanovic testifying at trial and had not specifically sought an adjournment for him to testify, there had not been a showing of due diligence. But, in fact, counsel had sought preclusion because he had no expert prepared to testify (A 3961-63). Further, it would have been obviously futile to seek a six week adjournment at the close of the People's case, on February 15, 2017 (the 25th day of trial), to enable Dr. Jovanovic sufficient time to complete his analysis and prepare to testify. An adjournment of trial for even a week or two at that point would have been insufficient, because, as counsel affirmed, Dr. Jovanovic required at least six weeks to complete his work. That is why counsel sought preclusion of Mr. Ray's testimony.

Finally, the prosecutor, who had opposed the motion for a *Frye* hearing, claimed, noted that the prosecutor had suggested there could be a battle of the experts (A 5042). To the contrary, the reality is that the prosecutor's mid-trial disclosure of the information pertaining to Mr. Ray, prevented a battle of experts at trial, since it

foreclosed the possibility of Mr. Clayton having a prepared expert to call as a trial witness.

In denying the motion, the Court held (1) it was significant to show Mr. Ray that there was no application for a continuance for Dr. Jovanovic to testify if his testimony was so crucial and (2) Dr. Jovanovic's position that what Mr. Ray did was not right was clearly known before the affidavit. (A 5043-44).

None of these reasons can justify a finding that Dr. Jovanovic's evidence was not newly discovered evidence which could not have been discovered with due diligence during trial. First, as explained above, since counsel repeatedly explained that he did not have an expert available to testify at trial and that it took nearly two months for Dr. Jovanovic to conduct and complete his review and analysis of Mr. Ray's evidence, there was no point in seeking a short continuance. That he had no expert to call during trial was expressly one of the reasons counsel sought preclusion of Mr. Ray's evidence.

Second, as also noted above, the fact that Dr. Jovanovic knew generally about problems with Mr. Rays' methodology, does not mean that he was prepared to testify with the specific examples of manipulations and unfounded extrapolations of the data. A defense attorney should not be forced to make the Hobson's choice of presenting an unprepared expert who had not completed his review and analysis or

wait for the expert to complete the work and risk being told that the expert's complete report cannot be considered as new evidence in a 330.30 motion because it was not completed during trial, where the prosecution's mid-trial disclosure of information is the reason that the expert was not prepared during the trial.

This Court, in *People v Madison* (106 AD3d 1490, 1492–94 [4th Dept 2013]), recently considered a similar dispute as to whether the information that formed the basis for a 330.30 motion could have been discovered by the defendant earlier by the exercise of reasonable diligence. In *Madison*, the evidence at issue was subscriber information for two prepaid cell phone numbers, and call records from another telephone number. This Court first recognized that "defense counsel clearly could have subpoenaed subscriber information or telephone records prior to trial." However, the Court held that because counsel did not timely receive clear information from the People regarding the relevant calls, "[i]t was only during the course of the trial that defendant learned the times of the offending calls and the telephone numbers from which he allegedly called the victim, at which point it was too late to subpoena the relevant records." Consequently, the Court agreed with defendant that the newly discovered evidence was not available to him prior to trial (*Id.*).

As in *Madison*, the failure of the prosecution in Mr. Clayton's case to disclose the critical information about Mr. Ray and his analysis earlier is the reason that counsel did not have Dr. Jovanovic and his report available prior to or during trial.

Similarly, in *People v Hildenbrandt* (125 AD2d 819, 821 [3d Dept 1986]), the Court held that, in view of "the practicalities of the situation," the defendant established that the testimony of the eyewitness could not have been produced by him with due diligence. The Court held that although the defense has an obligation to investigate the facts of the crime, the primary burden of investigating a crime is on the People through their agency, the police department. Thus, the Court refused to fault the defense for failing to conduct an investigation pre-trial beyond that done by the police. As in *Hildenbrandt*, the failure of the prosecution in Mr. Clayton's case to timely disclose information about Mr. Ray and his analysis is the reason that counsel did not have Dr. Jovanovic and his report available prior to or during trial.

Applying this standard of considering due diligence claims in the context of the " available resources and the practicalities of the particular situation," it was recently held that a defendant could not have produced evidence refuting the theory of a shaken baby syndrome at trial, even with due diligence, because "the bulk" of the medical research and literature supporting the defense position, only emerged following the trial (*People v Bailey*, 47 Misc3d 355, 372–73 [Monroe Co Ct 2014],

affd, 144 AD3d 1562, 1564 [4th Dept 2016]). Similarly, the fact that some of the problems with Mr. Ray's testimony were known during trial, does not mean that the full scope of the problems with his evidence could have been discovered, even with due diligence, prior to or during trial.

Finally, even if the lower court harbored doubts as to counsel's credibility regarding Dr. Jovanovic's inability to provide such information during trial, the court was required to order a hearing and make findings of fact (CPL § 330.40[1][f]).

C. Dr. Jovanovic's Affidavit and Report Is of Such Character as to Create a Probability That Had Such Evidence Been Received at the Trial the Verdict Would Have Been More Favorable to Mr. Clayton

The lower court erred in denying the motion, in part, on the ground that Dr. Jovanovic's evidence was merely an attempt to impeach Mr. Ray's evidence.

CPL § 330.30 (3) sets forth three elements which must be established for a verdict to be set aside on the basis of newly discovered evidence: (1) the new evidence has to have been discovered since the trial; (2) the new evidence could not have been produced by the defendant at the trial even with due diligence on his part; and (3) the new evidence must be of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant. However, citing, *People v Salemi* (309 NY 208, 215–216 [1955]), this Court has held that the new evidence must (1) be material, (2) not cumulative,

and (3) not merely impeach or contradict the record evidence (*People v Bailey*, 144 AD3d 1562, 1563 [4th Dept 2016]).

Mr. Clayton's motion urged that the statutory elements were met regarding Dr. Jovanovic's affidavit and report, and that if this newly discovered evidence had been presented at trial it was of such character as to create a probability of a different verdict (A 330, 337). Additionally, it was urged that the three additional requirements for the granting of such a motion, listed in *Salemi* and *Bailey* were satisfied (A 334-36), as this evidence:

> did not merely impeach or contradict record evidence; under the circumstances of this trial, and in the absence of any direct evidence supporting the defendant's guilt, the testimony of Sy Ray was the lynchpin of the prosecution's case. The testimony that could have been offered by Dr. Jovanovic, as detailed in the Affidavit and Report, was not merely impeachment on a collateral or immaterial issue – it refuted the testimony that lay at the core of the prosecution case.

(A 349-50)

In denying the motion, the lower court held, in part, that "that this is an attempt to get evidence from Jovanovic to impeach what was presented by Sy Ray. Impeachment evidence." (A 5344) To the extent that the denial of the motion was based on the court's description of Dr. Jovanovic's evidence as impeachment, the court was in error.

As detailed below, this Court and every other Appellate Division have reversed convictions based on new evidence which impeaches trial evidence, where the evidence that was thereby undermined was, as is the case with Mr. Ray's testimony, critical to the prosecution's case (see, *People v Hargrove*, 62 AD3d 25, [2 Dept.]; *People v Jackson*, 29 AD3d 328, 329 [1st Dept 2006]; *People v Santos*, 306 AD2d 197, 198 [1st Dept 2003]; *People v Harris*, 55 AD3d 958, 959 [3d Dept 2008]; *People v Martinez*,126 AD3d 1350, 1351[4th Dept 2015]). Indeed, the Court of Appeals has rejected the application of "merely evidence tending to impeach of discredit test" as a basis for rejecting recantation evidence where the impact of the recantation, if deemed credible, is to "destroy the basis upon which the . . . conviction rests." (*People v Shilanto*, 218 NY 161, 170 [1916]). Similarly, the United States Supreme Court, in *Napue v Illinois* (360 US 264 [1959]), ordered the granting of a state post-conviction motion based on new evidence, which controverted crucial prosecution witness's trial testimony that he had not been offered favorable consideration in return for his testimony because of the impact of the testimony shown to be false had on the verdict.

In *People v Hargrove* (162 AD3d 25 [2d Dept 2018]), the court considered many of these cases in the context of a 440 motion based on newly discovered evidence that undermined the complainant's credibility. Specifically, the new

evidence was that in other cases the Detectives who arrested Mr. Hargrove had engaged in a pattern of illegally suggesting identifications, manufacturing confessions and other accusatory testimony (*Id.*).

In determining whether this newly discovered evidence which undermined the credibility of the People's prime witness satisfied the requirements for a motion to set aside a conviction, the Second Department contrasted the three elements in the statute with the three additional elements derived exclusively from case law (*Id.*). Then the Court engaged in a review of decisions which reveal that New York courts in applying these common-law criteria, in fact, have not imposed the "not merely impeaching" factor as a formal legal requirement that must be established before a court is permitted to grant a new trial based on newly discovered evidence. The Court concluded that "[t]o the contrary, case law indicates that [whether the new evidence impeaches prior evidence] is a factual or discretionary factor that is used for evaluating whether the new evidence would 'create a probability' of a more favorable verdict." (*Id.*)

In so holding the Court noted the actual application of this criteria in numerous cases indicates that newly discovered impeachment evidence may properly form the basis for a new trial For example, in *People v Rensing* (14 NY2d 210 [1964]), the Court of Appeals held that a defendant convicted on the testimony of his co-

defendant was entitled to a new trial where after the trial the co-defendant "was certified as 'legally insane' and committed to [a] State Hospital" (*Id.* at 212) because of the potential impact this impeachment information would have had on the jury.

Then the *Hargrove* Court cited a number of other cases in which the First Department and the Second Department had reversed convictions based on newly discovered impeachment evidence in a variety of circumstances (*People v Hargrove*, 162 AD3d at 58-59). In one of those cases, *People v Santos* (306 AD2d 197, 198 [1st Dept 2003]) the new evidence was that the complainant had engaged in serious misconduct in other similar cases. The First Department held that this new impeachment evidence "went to the very heart of this defendant's trial defense" and created the probability of a more favorable verdict (*Id.* at 198).

Upon this review of the statutes and decisions, the Second Department determined that the three case law derived criteria only should be used to evaluate the ultimate issue of whether the new evidence would "create a probability" of a more favorable verdict (*People v Hargrove*, 162 AD3d at 65).

The Court of Appeals and this Court have held that recantation evidence, if credible and from a key witness, can justify the granting of a motion to vacate a conviction (*People v Shilanto*, 218 NY 161, 170 [1916]; *People v Martinez*,126 AD3d 1350, 1351[4th Dept 2015]. That is because although recantation evidence is

by definition evidence impeaching prior testimony, the impact of the recantation, if deemed credible, is to "destroy the basis upon which the . . . conviction rests." (*People v Shilanto*, 218 NY 161, 170 [1916]). Thus, creating a probability of a different verdict.

In sum, as the Second Department explained in *Hargrove*, the relevant statutory element is that the newly discovered evidence created a probability of a different verdict, and evidence which undermines the crux of the People's case meets that test even if such evidence can be described as impeachment evidence. That is precisely the argument made in the memorandum in support of the 330 motion, in which it was urged that this evidence

> did not merely impeach of contradict record evidence; under the circumstances of this trial, and in the absence of any direct evidence supporting the defendant's guilt, *the testimony of Sy Ray was the lynchpin of the prosecution's case*. The testimony ... was not merely impeachment on a collateral or immaterial issue – *it refuted the testimony that lay at the core of the prosecution case*.

(A 349-50.)

Finally, and illogically, in denying the motion the court complained that there was only an affidavit from Dr. Jovanovic "which is not subject to cross-examination, not subjected to a fair fight as far as fleshing out what it says ..." (A 5344.) That problem existed because the court denied the motion without conducting a hearing. At a minimum, a hearing is required, since this Court "cannot conclude on the record

before us that 'there is no reasonable possibility' that [Dr. Jovanovic's] statements are true." (*People v Becoats*, 117 AD3d 1465 [4th Dept 2014].

As described above in Point IV(A), Mr. Ray's geo-location evidence was the crux of the People's case and Dr. Jovanovic's findings regarding Mr. Ray's improper extrapolation, deliberate manipulation of unreliable data, and reliance on faulty assumptions, exacerbated by Mr. Ray's reliance on unreliable drive test scans, eroded the very foundation of Mr. Ray's analysis. Consequently, the court below should either have granted the motion or ordered a hearing as to whether Dr. Jovanovic's evidence sufficiently undermined Mr. Ray's testimony as to create a probability of a different verdict.

CONCLUSION

The judgment of conviction should be reversed and the Indictment dismissed because the verdicts were not supported by legally sufficient evidence and were against the weight of the credible evidence.

In the alternative, this Court should order that the conviction be reversed and a new trial ordered because Mr. Clayton was deprived of a fair trial as a result of discovery violations and/or the admission of unreliable expert testimony and/or the denial, without a hearing, of the motion to set aside the verdict because of newly discovered evidence.

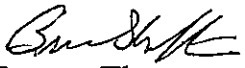
In the alternative, this Court should order that the conviction be reversed and a new trial ordered, with an order that a *Frye* hearing be held to determine if the testimony of Mr. Ray can be admitted at a re-trial.

In the alternative, this Court should order that appeal be held in abeyance and the case remitted to County Court for a hearing on the motion to set aside the verdict because of newly discovered evidence.

In the alternative this Court should order such relief as it believes to be just and proper.

Dated: October 15, 2018

Respectfully submitted,



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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-vs-

THOMAS S. CLAYTON,

Defendant-Appellant.

Rule 1250.8 (j) Printing Specification Statement

The attached brief was prepared on a computer using Word Perfect X7 program with Times New Roman font, 14 point size, double spaced.

The word count pursuant to the Word Perfect X7 word count system is 35,254.

By Order of this Court dated October 10, 2018, Mr. Clayton has been granted permission to file a brief not exceeding 35,260 word.

Brian Shiffrin